TRANSCRIPT OF RECORD

1

Supreme Court of the United States

OCTOBER TERM, [redacted] 1958

No. [redacted] 48

UNITED STATES OF AMERICA FOR THE BENEFIT AND ON BEHALF OF HARRY SHERMAN, CHAS. ROBINSON, RONALD D. WRIGHT, ET AL., PETITIONERS,

vs.

DONALD G. CARTER, INDIVIDUALLY; DONALD G. CARTER, DOING BUSINESS AS CARTER CONSTRUCTION COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 12, 1958

CERTIORARI GRANTED APRIL 28, 1958

No. 14703

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA for the Benefit and on Behalf of HARRY SHERMAN, CHAS. ROBINSON, RONALD D. WRIGHT, STUART SCOFIELD, LEE LALOR, WILLIAM AMES, ERNEST CLEMENTS, CARL LAWRENCE, GORDON POLLOCK and HAROLD SJOBERG, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California,

Appellant,

vs.

DONALD G. CARTER, Individually; DONALD G. CARTER, Doing Business as Carter Construction Company, CARTER CONSTRUCTION COMPANY and HARTFORD ACCIDENT AND INDEMNITY CO.,

Appellees.

Transcript of Record

Appeal from the United States District Court
Northern District of California
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Appellants.

DINKELSPIEL & DINKELSPIEL,
405 Montgomery St.,
San Francisco, Calif.,

Attorneys for Appellee, Hartford Accident & Indemnity Company.

In the United States District Court, Northern District of California, Southern Division

No. 33521

THE UNITED STATES OF AMERICA for the Benefit and on Behalf of HARRY SHERMAN, CHAS. ROBINSON, RONALD D. WRIGHT, STUART SCOFIELD, LEE LALOR, WILLIAM AMES, ERNEST CLEMENTS, CARL LAWRENCE, GORDON POLLOCK and HAROLD SJOBERG, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California,

Plaintiffs,

vs.

DONALD G. CARTER, Individually, DONALD G. CARTER d/b/a CARTER CONSTRUCTION COMPANY, CARTER CONSTRUCTION COMPANY, HARTFORD ACCIDENT AND INDEMNITY CO., FIRST DOE, SECOND DOE, THIRD DOE, BLACK CORPORATION, WHITE CORPORATION, BLUE CO., a Partnership, and GRAY CO., a Partnership,

Defendants.

AMENDED COMPLAINT IN ACTION IN THE NAME OF THE UNITED STATES FOR THE BENEFIT OF FURNISHER OF LABOR AND MATERIALS UNDER MATERIALMENS' ACT

The United States of America suing herein for the benefit and on behalf of Harry Sherman, Chas.

Robinson, Ronald D. Wright, Stuart Scofield, Lee Lalor, William Ames, Ernest Clements, Carl Lawrence, Gordon Pollock and Harold Sjoberg, as trustees of the Laborers Health and Welfare Trust Fund for Northern California, complain of defendants, and each of them, and for cause of action allege:

I.

At all times herein mentioned plaintiffs were and now are the duly appointed, qualified and acting Trustees of the Laborers Health and Welfare Trust Fund for Northern California, hereinafter referred to as the "Fund," which Fund has its principal office in the City and County of San Francisco, State of California.

II.

Plaintiffs are informed and believe and upon such information and belief allege that defendants Donald G. Carter, Donald G. Carter doing business as Carter Construction Company and Carter Construction Company at all times mentioned herein were and now are residents of the City of Lincoln, County of Placer, State of California.

III.

Plaintiffs are informed and believe and upon such information and belief allege that at all times herein mentioned defendant Hartford Accident and Indemnity Co., was and now is a corporation organized and existing under the laws of the State of Connecticut.

IV.

Plaintiffs are ignorant of the true names of defendants First Doe, Second Doe, Third Doe, Black Corporation, White Corporation, Blue Co., a partnership, and Gray Co., a partnership, and therefore sue each of said defendants by said names, each of which is fictitious, and pray leave to substitute the true name of each of them when the same is ascertained.

V.

Plaintiffs are informed and believe and upon such information and belief allege that on or about November, 1952, defendant Donald G. Carter doing business as Carter Construction Company duly entered into two contracts in writing, one being Contract No. DA-04-167-ENG-936, with the United States of America, wherein and whereby it was agreed that said defendant was to furnish the material and perform the work for the construction and completion of the Fly-Away Kit Storage Building at Travis Air Force Base in the County of Solano, State of California, in accordance with the specifications, drawings, terms and conditions therein specifically set forth, in consideration whereof the United States of America agreed to pay to defendant Donald G. Carter doing business as Carter Construction Company a sum of money, the amount of which is unknown to plaintiffs, the other being Contract No. DA-04-167-ENG-961, with the United States of America, wherein and whereby it was agreed that said defendant was to furnish the material and perform the work for the con-

struction and completion of the Navigation Trainer Building at Mather Field in the County of Sacramento, State of California, in accordance with the specifications, drawings, terms and conditions therein specifically set forth, in consideration whereof the United States of America agreed to pay to defendant Donald G. Carter doing business as Carter Construction Company a sum of money, the amount of which is unkown to plaintiffs.

VI.

Plaintiffs are informed and believe and upon such information and belief allege that on or about November, 1952, pursuant to the Act of Congress, approved August 24, 1935, (40 U.S.C.A. Sec. 270(a)), and pursuant to the terms of the aforesaid contracts, the defendant Donald G. Carter doing business as Carter Construction Company, as principal, and defendant Hartford Accident and Indemnity Co., as surety, for a good and valuable consideration, duly made, executed and delivered to the United States of America, their bond or bonds conditioned as required by the said Act.

VII.

Plaintiffs are informed and believe and upon such information and belief allege that the defendant Donald G. Carter doing business as Carter Construction Company entered upon the performance of the said contracts for the construction of said Fly-Away Kit Storage Building and of said Navigation Trainer Building and furnished labor and ma-

terials therefor and continued to perform the contracts and the performance thereof has been completed and final settlement of said contracts has been made.

VIII.

Plaintiffs are informed and believe and upon such information and belief allege that less than one year has elapsed since the date of the final settlement of said contracts.

IX.

The Fund was created by a written Trust Agreement made and entered into on the 4th day of March, 1953, by and between Northern California Chapter and Central California Chapter, The Associated General Contractors of America, Inc., as Employers, and Northern California District Council of Hod Carriers, Building and Construction Laborers of the International Hod Carriers, Building and Common Laborers Union of America, as Union, pursuant to written collective bargaining agreements between said Employers and said Union. The Associated Home Builders of Sacramento, of which defendant Donald G. Carter doing business as Carter Construction Company was at all relevant times a member in good standing, signed said Trust Agreement and ratified and approved one of said collective bargaining agreements for and on behalf of, and as agent for, the members of said association, including defendant Donald G. Carter doing business as Carter Construction Company.

X.

By virtue of said written agreements and in consideration of labor and services performed and to

be performed for said defendant on said Fly-Away Kit Storage Building and said Navigation Trainer Building by laborers, said defendant Donald G. Carter doing business as Carter Construction Company agreed (a) that he would contribute and pay into the Fund in San Francisco, California, the sum of seven and one-half cents (7½c) per hour for each hour worked by any laborers employed by him on said buildings on and after February 1, 1953, in regular monthly installments starting on or before March 15, 1953, and continuing from month to month thereafter; (b) that in the event any one of said monthly contributions was not paid on or before the 25th day of the month in which said contribution became due, he would pay $20.00 or 10 per cent of the amount of the contribution due, whichever was greater, into the Fund in San Francisco, California, as and for liquidated damages and not as a penalty; and (c) that in the event the Board of Trustees of said Fund consulted legal counsel with respect to any default in the payment of said contributions or filed any suit or claim with respect thereto against him, said Donald G. Carter doing business as Carter Construction Company would pay into the Fund in San Francisco, California, reasonable attorneys' fees, court costs and all other reasonable expenses incurred by the Board in connection with such suit or claim.

XI.

Under and pursuant to said written agreements and in consideration thereof, laborers performed

labor and services on said Fly-Away Kit Storage Building and said Navigation Trainer Building and defendants, and each of them, have defaulted in the performance of said written agreements and plaintiffs are informed and believe and upon such information and belief allege that by virtue of such default and in consideration of said labor and services rendered, there is now due, owing and unpaid to plaintiffs from defendants, and each of them, for labor and services performed for and on behalf of defendant Donald G. Carter doing business as Carter Construction Company by laborers on said buildings, the following sums:

(1) The sum of $59.02 as and for the unpaid contribution to said Fund which became due on March 15, 1953;

(2) The sum of $91.05 as and for the unpaid contribution to said Fund which became due on April 15, 1953;

(3) The sum of $79.87 as and for the unpaid contribution to said Fund which became due on May 15, 1953;

(4) The sum of $60.00 as and for liquidated damages and not as a penalty by reason of said defendants' failure to pay said contributions in full on or before the 25th day of the months of March, April, and May, 1953;

(5) Interest at the legal rate on each of said sums from the respective due dates thereof; and

(6) The sum of $200.00 as and for reasonable attorneys' fees in connection with the collection of said sums.

Plaintiffs are duly authorized to sue and collect said sums on behalf of and for the benefit of said laborers.

XII.

That the condition of the bond or bonds of defendants Hartford Accident and Indemnity Co., is such that if the said Donald G. Carter doing business as Carter Construction Company, shall promptly make payment to all persons supplying labor and materials in the prosecution of the work provided for in said contracts, and any and all duly authorized modifications of said contracts that might thereafter be made, then the obligation of said bond or bonds is to be void; otherwise, it is to remain in full force and virtue; and that although demand for payment of the aforementioned sums has been made upon said defendant Hartford Accident and Indemnity Co., said defendant has failed, neglected and refused and does still fail, neglect and refuse to pay said sums or any part thereof as it is obligated to do under said bond or bonds.

XIII.

Plaintiffs are informed and believe and upon such information and belief allege that more than ninety days have elapsed since the date on which the last of the labor as hereinabove more particularly set forth was done and performed in the prosecution of said work.

Wherefore, the United States of America, on behalf and to the use of Harry Sherman, Chas. Robinson, Ronald D. Wright, Stuart Scofield, Lee Lalor, William Ames, Ernest Clements, Carl Lawrence, Gordon Pollock and Harold Sjoberg, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California, prays judgment against defendants, and each of them, for the sum of $489.94 together with interest and costs, and for such other and further relief as the court may deem proper in the premises.

Dated this 9th day of June, 1954.

/s/ CHARLES P. SCULLY,
JOHNSON & STANTON,

By /s/ THOMAS E. STANTON, JR.,
Attorneys for Plaintiffs.

Duly Verified.

[Endorsed]: Filed June 9, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY JUDGMENT

To Charles P. Scully, Johnson & Stanton and Thomas E. Stanton, Jr., Attorneys for the Plaintiffs;

Please take notice that the undersigned will bring the attached Motion for Summary Judgment on for hearing before the Honorable Louis E. Goodman, at Room 258 of the Post Office and Courthouse Building at Seventh and Mission Streets in the City and

County of San Francisco, State of California, on the 10th day of January, 1955, at 9:30 o'clock a.m., or as soon thereafter as counsel can be heard, and that the motion will be submitted on the pleadings and admissions of the fact on file herein.

Dated: 20th day of December, 1954.

DINKELSPIEL &
DINKELSPIEL,

By /s/ ROBERT J. DREWES,

Attorneys for Defendant, Hartford Accident and Indemnity Company.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

The defendant, Hartford Accident and Indemnity Company, a corporation, by its attorneys, Dinkelspiel & Dinkelspiel and Robert J. Drewes, hereby moves the Court to enter summary judgment for said defendant, in accordance with the provisions of Rule 56(b) of the Rules of Civil Procedure, on the ground the pleadings and admissions of facts herein show that the defendant is entitled to judgment as a matter of law.

DINKELSPIEL &
DINKELSPIEL,

By /s/ ROBERT J. DREWES,

Attorneys for Defendant, Hartford Accident and Indemnity Company.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 20, 1954.

[Title of District Court and Cause.]

ADMISSIONS OF FACTS FOR PURPOSES OF MOTIONS FOR SUMMARY JUDGMENT

It is Hereby Stipulated by the plaintiffs and by defendant Hartford Accident and Indemnity Company, by and through their respective attorneys of record, and solely for the purpose of the motion and cross-motion for summary judgment on file herein, as follows:

1. Said defendant admits each and every one of the allegations of the Amended Complaint on file herein.

2. The parties admit that each of the contracts referred to in Paragraph V of said Amended Complaint provides in Paragraph 14 that said contract is subject to all provisions and exceptions of the Davis-Bacon Act (40 U.S.C. 276(a)) including the provision that the contractor "shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by applicable regulations prescribed by the Secretary of Labor), the full amounts accrued at time of payment computed at wage rates not less than those stated in the specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or sub-contractor, and such laborers and mechanics * * *"

3. The parties admit that the contractor named

in said contract paid the wage rates stated in the specifications referred to in said contracts, weekly in full, and without deduction or rebate on any account. No deduction was made or required to be made from said wage rates for payments into the Fund referred to in said Amended Complaint.

4. The parties admit that the bonds referred to in Paragraph VI of said complaint consisted of a Performance Bond with respect to each contract in the form attached as Exhibit A, and a Payment Bond in connection with each contract in the form attached as Exhibit B. It is admitted that in each case the limit of the bond is adequate to pay the amount of the plaintiff's claim, if such claim is properly allowable against said bond.

5. The parties agree that a true and correct copy of the Trust Agreement referred to in Paragraph IX of said Amended Complaint is attached as Exhibit C.

Dated: November 18, 1954.

CHARLES P. SCULLY,
JOHNSON & STANTON,

By /s/ THOMAS E. STANTON, JR.,
Attorneys for Plaintiffs.

DINKELSPIEL &
DINKELSPIEL,

By /s/ ROBERT J. DREWES,
Attorneys for Defendant, Hartford Accident and Indemnity Co.

[Endorsed]: Filed December 23, 1954.

EXHIBIT A

(Copy)

Standard Form 25. Revised November, 1950. Prescribed by General Services Administration. General Regulation No. 5.

Date Bond Executed:
January 2, 1953.

Performance Bond
(See Instructions on Reverse)

Principal:
Donald G. Carter, an Individual, dba Carter Construction Company, 724 - 56th Street, Sacramento, California.

Surety:
Hartford Accident and Indemnity Company, a body corporate, duly incorporated under the laws of the State of Connecticut and authorized to act as surety under the act of Congress, approved August 13, 1894, as amended by the act of congress, approved March 28, 1910, whose principal office is located in the city of Hartford.

Penal Sum of Bond (express in words and figures)
Fifty-Two Thousand Four Hundred Thirty-Four and 30/100 Dollars ($52,434.30).

Contract No.:
DA 04—167 eng 936.

Date of Contract:
January 2, 1953.

Know All Men by These Presents, That we, the Principal and Surety above named, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of the amount stated above, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation is Such, that whereas the principal entered into a certain contract with the Government, numbered and dated as shown above and hereto attached;

Now Therefore, if the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several

seals on the date indicated above, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

* * *

The rate of premium on this bond is $10.00 per thousand on contract price.

Total amount of premium charged, $1,048.69.

(The above must be filled in by corporate surety)

[Certificate as to Corporate Principal and Instructions.]

EXHIBIT B

(Copy)

PAYMENT BOND
(See Instructions on Reverse)

Standard Form 25A
Revised November, 1950
Prescribed by General
Services Administration
General Regulation No. 5

Date Bond Executed:

January 2, 1953.

Principal:

Donald G. Carter, an Individual d/b/a Carter Construction Company, 724-56th Street, Sacramento, California.

Surety:

Hartford Accident and Indemnity Company, a body corporate, duly incorporated under the laws of the State of Connecticut and authorized to act as surety under the act of Congress, approved August 13, 1894, as amended by the act of Congress, approved March 23, 1910, whose principal office is located in the City of Hartford.

Penal Sum of Bond (express in words and figures):

Fifty-Two Thousand Four Hundred Thirty-Four and 30/100 Dollars ($52,434.30).

Contract No:

DA 04—167 eng 936.

Date of Contract:

January 2, 1953.

Know All Men by These Presents, That we, the Principal and Surety above named, are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of the amount stated above, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation is Such, that whereas the principal entered into a certain con-

tract with the Government, numbered and dated as shown above and hereto attached.

Now Therefore, if the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals on the date indicated above, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

* * *

The rate of premium on this bond is (Premium included on Performance Bond) per thousand.

Total amount of premium charged, $1,048.69.

(The above must be filled in by corporate surety)

[Certificate as to Corporate Principal and Instructions.]

Exhibit C

TRUST AGREEMENT

LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA

Between

NORTHERN CALIFORNIA CHAPTER AND CENTRAL CALIFORNIA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

and

NORTHERN CALIFORNIA DISTRICT COUNCIL OF HOD CARRIERS, BUILDING AND CONSTRUCTION LABORERS

Affiliated with

THE INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA

TRUST AGREEMENT

LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA

Between

NORTHERN CALIFORNIA CHAPTER AND CENTRAL CALIFORNIA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.

and

NORTHERN CALIFORNIA DISTRICT COUNCIL OF HOD CARRIERS, BUILDING AND CONSTRUCTION LABORERS

Affiliated with

THE INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA

TRUST AGREEMENT
LABORERS HEALTH AND WELFARE
TRUST FUND FOR NORTHERN CALIFORNIA

This TRUST AGREEMENT, made and entered into as of the 4th day of March, 1953, by and between NORTHERN CALIFORNIA CHAPTER AND CENTRAL CALIFORNIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., hereinafter referred to as the "Employers," and NORTHERN CALIFORNIA DISTRICT COUNCIL OF HOD CARRIERS, BUILDING AND CONSTRUCTION LABORERS OF THE INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, hereinafter referred to as the "Union," recites and provides as follows:

Recitals:

1. The Employers, and the other employer organizations signatory to this agreement, are parties to various collective bargaining agreements with the Union which provide that commencing on February 1, 1953, each individual employer covered by any of said agreements will contribute the sum of seven and one-half cents *(7½c) per hour for each hour worked by employees under such agreements to a Health and Welfare Plan to be established for the benefit of such employees.

2. The parties have agreed that such contributions shall be payable to and be deposited in the Trust Fund created and established by this trust agreement.

3. The purpose of this trust agreement is to provide for the establishment of such Trust Fund and for the maintenance of such Health and Welfare Plan in accordance with the terms of the collective bargaining agreements.

Provisions:

In consideration of the foregoing, and of the mutual promises hereinafter provided, the parties agree as follows:

*Effective February 1, 1955, this rate of contribution was increased to ten cents (10c) per hour by amendment to the collective bargaining agreements.

ARTICLE I.
Definitions

Unless the context or subject matter otherwise requires, the following definitions shall govern in this trust agreement:

Section 1.

The term "collective bargaining agreements" includes (a) the Master Agreement between Employers and the Union for the 46 Northern California Counties dated June 4, 1952, and the Tunnel Master Agreement between Employers and Union, dated June 18, 1952, (b) any other collective bargaining agreement between the Union, or any of its affiliated local unions, and any employer organization or individual employer which provides for the making of employer contributions to the Fund, and (c) any extension or renewal of any of said agreements which provides for the making of employer contributions to the Fund.

Section 2.

The term "individual employer" means any employer who is required by any of the collective bargaining agreements to make contributions to the Fund, or who does in fact make one or more contributions to the Fund.

Section 3.

The term "employee" means any employee of an individual employer who performs work covered by any of the collective bargaining agreements.

Section 4.

The term "Fund" means the trust fund created and established by this agreement.

Section 5.

The term "Health and Welfare Plan" means the Health and Welfare Plan established by the Employers and the Union pursuant to the collective bargaining agreements, and any amendments to or modifications of said Plan pursuant to such agreements.

Section 6.

The term "signatory association" means any employer organization, other than Employers, which signs this agreement on behalf of its members or executes on behalf of such members a written acceptance of any agreement to be bound by the terms of this agreement.

ARTICLE II.
Trust Fund

Section 1.

There is hereby created the LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, which shall consist of all contributions required by the collective bargaining agreements to be made for the establishment and maintenance of the Health and Welfare Plan, and all interest, income and other returns thereon of any kind whatsoever.

Section 2.

The Fund shall have its principal office in the City and County of San Francisco.

Section 3.

Contributions to the Fund shall not constitute or be deemed to be wages due to the employees with respect to whose work such payments are made, and no employee shall be entitled to receive any part of the contributions made or required to be made to the Fund in lieu of the benefits provided by the Health and Welfare Plan.

Section 4.

Neither the Employers, any signatory association, any individual employer, the Union, any beneficiary of the Health and Welfare Plan nor any other person shall have any right, title or interest in the Fund other than as specifically provided in this agreement, and no part of the Fund shall revert to the Employers, any signatory association or any individual employer. Neither the Fund nor any contributions to the Fund shall be in any manner liable for or subject to the debts, contracts or liabilities

of the Employers, any signatory association, any individual employer, the Union, or any employee. No part of the Fund, nor any benefits payable in accordance with the Health and Welfare Plan shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge by any person; provided, however, that the Board of Trustees shall establish a procedure whereby any employee may direct that benefits due him be paid to an institution in which he is hospitalized in consideration for medical or hospital services rendered or to be rendered.

Section 5.

Neither the Employers or any signatory association, nor any officer, agent, employee or committee member of the Employers or any signatory association, shall be liable to make contributions to the Fund or be under any other liability to the Fund or with respect to the Health and Welfare Plan, except to the extent that he may be an individual employer required to make contributions to the Fund with respect to his own individual or joint venture operations, or to the extent he may incur liability as a trustee as hereinafter provided. The liability of any individual employer to the Fund, or with respect to the Health and Welfare Plan, shall be limited to the payments required by the collective bargaining agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the contributions due from other individual employers with respect to the operations of such employers. The individual employers shall not be required to make any further payments or contributions to the cost of operation of the Fund or of the Health and Welfare Plan, except as may be hereafter provided in the collective bargaining agreements.

Section 6.

Neither the Employers, any signatory association, any individual employer, the Union, nor any employee shall be liable or responsible for any debts, liabilities or obligations of the Fund or the trustees.

Section 7.

Contributions to the Fund shall be due commencing February 1, 1953, for work on or after that date, and shall be payable in San Francisco, California, in regular monthly installments starting on or before March 15, 1953, and continuing from month to month thereafter subject to the provisions of the collective bargaining agreements. The contribution payable on or before March 15, 1953, shall include all payments which have theretofore accrued for work performed during the period from February 1, 1953, up to the close of the individual employer's payroll period ending closest to the last day of that month, and thereafter each monthly contribution shall include all payments which have accrued in the interim for work performed up to the close of the individual employer's payroll period ending closest to the last day of the preceding calendar month. Each monthly contribution shall be accompanied by a report in a form prescribed by the Board of Trustees.

Section 8.

Each contribution to the Fund shall be made promptly, and in any event on or before the 25th day of the calendar month in which it becomes payable, on which date said contribution, if not then paid in full, shall be delinquent. If any individual employer fails to make his or its monthly contribution in full on or before the 25th day of the month on four occasions within any twelve-month period, the Board of Trustees may provide by resolution that thereafter during the twelve-month period immediately following such resolution the 15th day of the month shall be the delinquency date for such individual employer. The parties recognize and acknowledge that the regular and prompt payment of employer contributions to the Fund is essential to the maintenance in effect of the Health and Welfare Plan, and that it would be extremely difficult, if not impracticable to fix the actual expense and damage to the Fund and to the Health and Welfare Plan which would result from the failure of an individual employer to pay such monthly contributions in full within

the time above provided. Therefore, the amount of damage to the Fund and Health and Welfare Plan resulting from any such failure shall be presumed to be the sum of $20 per delinquency or 10% of the amount of the contribution or contributions due, whichever is greater, which amount shall become due and payable to the Fund as liquidated damages and not as a penalty, in San Francisco, California, upon the day immediately following the date on which the contribution or contributions become delinquent and shall be in addition to said delinquent contribution or contributions.

ARTICLE III.

Board of Trustees

Section 1.

The Fund shall be administered by a Board of Trustees which shall consist of five trustees representing the individual employers and five trustees representing the employees. The trustees representing the individual employers shall be appointed in writing by the Employers, who are hereby irrevocably designated by each individual employer as his or its attorneys in fact for the purpose of appointing and removing trustees and successor trustees. The trustees representing the employees shall be appointed by the Union by an instrument in writing signed by the Executive Officer of the Union, and bearing the Union seal. The trustees so appointed shall sign this trust agreement, or a duplicate thereof, and such signatures shall constitute their acceptance of office and agreement to act under and be subject to all of the terms and conditions of this trust agreement.

Section 2.

The trustees shall select one of their number to act as Chairman of the Board of Trustees and one to act as Co-Chairman, to serve for such period as the trustees shall determine. When the Chairman is selected from among the Employer Trustees, the Co-Chairman shall be selected from among the Employee Trustees, and vice versa.

Section 3.

Each trustee shall serve until his death, resignation or removal from office.

Section 4.

A trustee may resign at any time by serving written notice of such resignation upon the Chairman and Co-Chairman of the Board of Trustees, and upon the Employers and the Union, at least 30 days prior to the date on which such resignation is to be effective.

Section 5.

Any Employer Trustee may be removed from office at any time, for any reason, by an instrument in writing signed by the Employers, and served on the trustee, the Chairman and Co-Chairman of the Board of Trustees and the Union. Any Employee Trustee may be removed from office at any time, for any reason, by an instrument in writing signed by the Executive Officer of the Union, and bearing the Union seal and served on the trustee, the Chairman and Co-Chairman of the Board of Trustees and the Employers.

Section 6.

If any Employer Trustee dies, resigns or is removed from office, a successor trustee shall be appointed forthwith by an instrument in writing signed by the Employers. If any Employee Trustee dies, resigns or is removed from office, a successor trustee shall be appointed forthwith by an instrument in writing signed by the Executive Officer of the Union and bearing the Union seal. Any successor trustee so appointed shall sign this trust agreement, or a duplicate thereof, and such signature shall constitute his acceptance of office and agreement to act under and be subject to all of the terms and conditions of this trust agreement.

ARTICLE IV.

Functions and Powers of Board of Trustees

Section 1.

The Board of Trustees shall have the power to admin-

ister the Fund and to administer and maintain the Health and Welfare Plan in effect.

Section 2.

The Board of Trustees shall collect and receive all contributions due to the Fund, and shall deposit such contributions in a special trust fund account or accounts established in a reputable bank or banks located in the city and county of the principal office of the Fund.

Section 3.

The Board of Trustees shall have the power to demand and enforce the prompt payment of contributions to the Fund, and the payments due to delinquencies as provided in Section 8 of Article II. If any individual employer defaults in the making of such contributions or payments and if the Board consults legal counsel with respect thereto, or files any suit or claim with respect thereto, there shall be added to the obligation of the employer who is in default, reasonable attorneys' fees, court costs and all other reasonable expenses incurred by the Board in connection with such suit or claim.

Section 4.

The Board of Trustees shall promptly use the moneys available in the Fund first to provide the benefits specified in the Health and Welfare Plan. The Board shall have power to enter into contracts and procure insurance policies necessary to place into effect and maintain the Health and Welfare Plan, to terminate, modify or renew any such contracts or policies subject to the provisions of the Plan, and to exercise and claim all rights and benefits granted to the Board or the Fund by any such contracts or policies. Any such contract may be executed in the name of the Fund, and any such policy may be procured in such name.

Section 5.

The Board of Trustees shall have power:

(A) To pay out of the Fund the reasonable expenses incurred in the establishment of the Fund and the Health and Welfare Plan.

(B) To establish and accumulate such reserve funds as may be adequate to provide for administration expenses and other obligations of the Fund, including the maintenance in effect of the Health and Welfare Plan.

(C) To employ such executive, consultant, administrative, clerical, secretarial and legal personnel and other employees and assistants, as may be necessary in connection with the administration of the Fund and the Health and Welfare Plan and to pay or cause to be paid, out of the Fund, the compensation and necessary expenses of such personnel and assistants and the cost of office space, furnishings and supplies and other essentials required in such administration. If the Board is unable to agree upon the employment of either a consultant or an attorney pursuant to this clause, the Employer Trustees and the Employee Trustees may each select either a consultant or an attorney, or both, as the case may require, who shall be directed to act jointly with each other in connection with the administration of the Fund, and the reasonable cost of such advice or services shall be paid from the Fund.

(D) To incur and pay out of the Fund any other expense reasonably incidental to the administration of the Fund or the Health and Welfare Plan.

(E) To compromise, settle, or release claims or demands in favor of or against the Fund on such terms and conditions as the Board may deem desirable; provided, however, that this clause shall not excuse any violation of any of the collective bargaining agreements.

(F) To invest and reinvest such portion of the Fund as is not required for current expenditures and charges in bonds of the United States.

(G) To adopt rules and regulations for the administration of the Fund and the Health and Welfare Plan which are not inconsistent with the terms and intent of this agreement and such Plan.

Section 6.

The Board of Trustees shall procure fidelity bonds for each trustee or other person authorized to receive, handle,

deal with or draw upon the moneys in the Fund for any purpose whatsoever, said bonds to be in such reasonable amount and to be obtained from such source as the Board shall determine. The cost of such bonds shall be paid out of the Fund.

Section 7.

All checks, drafts, vouchers or other withdrawals of money from the Fund shall be authorized in writing or countersigned by at least one Employer Trustee and one Employee Trustee.

Section 8.

The Board of Trustees shall maintain suitable and adequate records of and for the administration of the Fund and the Health and Welfare Plan. The Board may require the Employers, any signatory association, any individual employer, the Union, any employee or any other beneficiary under the Health and Welfare Plan to submit to it any information, data, report or documents reasonably relevant to and suitable for the purposes of such administration; provided, however, that the Union shall not be required to submit lists of membership. The parties agree that they will use their best efforts to secure compliance with any reasonable request of the Board for any such information, data, report or documents. Upon request in writing from the Board, any individual employer will permit a certified public accountant selected by the Board to enter upon the premises of such employer during business hours, at a reasonable time or times, and to examine and copy such books, records, papers or reports of such employer as may be necessary to determine whether the employer is making full and prompt payment of all sums required to be paid by him or it to the Fund.

Section 9.

The books of account and records of the Board of Trustees, including the books of account and records pertaining to the Fund, shall be audited at least once each year by a qualified certified public accountant to be se-

lected by the Board. The Board shall also make all other reports required by law. A statement of the results of the annual audit shall be available for inspection by interested persons at the principal office of the Fund and at such other suitable place as the Board may designate from time to time. Copies of such statement shall be delivered to the Employers, the Union and each trustee within five days after the statement is prepared.

Section 10.

The Board of Trustees may coordinate its activities in the administration of the Fund and the Health and Welfare Plan with the administrative activities of the boards of trustees of other trust funds and health and welfare plans established or to be established in California to such extent as may be necessary or desirable to minimize administrative costs, eliminate unnecessary bookkeeping and other expenses for the individual employers and avoid or eliminate duplicating employer contributions or insurance coverage with relation to the same employee. The Board may agree to exercise and exercise any of its functions and powers jointly with any one or more of the board of trustees of such other trust funds, and it may agree to join with and join with any one or more of said boards in establishing a joint office or joint administrative personnel.

ARTICLE V.

Procedure of Board of Trustees

Section 1.

The Board of Trustees shall determine the time and place for regular periodic meetings of the Board. Either the Chairman or the Co-Chairman, or any three members of the Board, may call a special meeting of the Board by giving written notice to all other trustees of the time and place of such meeting at least five days before the date set for the meeting. Any such notice of special meeting shall be sufficient if sent by ordinary mail or by wire addressed to the trustee at his address as shown in the records of the Board. Any meeting at which all trustees are

present, or concerning which all trustees have waived notice in writing, shall be a valid meeting without the giving of any notice.

Section 2.

The Board shall appoint a secretary who shall keep minutes or records of all meetings, proceedings and acts of the Board. Such minutes need not be verbatim.

Section 3.

The Board shall not take any action or make any decision on any matter coming before it or presented to it for consideration or exercise any power or right given or reserved to it or conferred upon it by this trust agreement except upon the vote of a majority of all ten of the trustees at a meeting of the Board duly and regularly called or except by the signed concurrence of all ten trustees without a meeting, as provided in section 5 of this Article. In the event of the absence of any Employer Trustee from a meeting of the Board, the Employer Trustees present at such meeting may vote on behalf of such absent trustee and if such Employer Trustees cannot all agree as to how the vote of such absent Employer Trustee shall be cast then it shall be cast as the majority of them shall determine or, in the absence of such majority determination, it shall be cast as the Employer Trustee Chairman or Co-Chairman of the Board shall determine. In the event of the absence of any Employee Trustee from a meeting of the Board, the Employee Trustees present at such meeting may vote on behalf of such absent trustee pursuant to the same method and in the same manner as above provided for Employer Trustees to cast the vote of any absent Employer Trustee.

Section 4.

All meetings of the Board shall be held at the principal office of the Fund unless another place is designated from time to time by the Board.

Section 5.

Upon any matter which may properly come before the Board of Trustees, the Board may act in writing without

a meeting, provided such action has the concurrence of all of the trustees.

Section 6.

The party appointing a trustee, or successor trustee, may give the trustee so appointed such instructions as the party appointing considers for the benefit of the individual employers or employees represented by such trustee, as the case may be.

ARTICLE VI.

General Provisions Applicable to Trustees

Section 1.

No party who has verified that he or it is dealing with the duly appointed trustees, or any of them, shall be obligated to see to the application of any moneys or property of the Fund, or to see that the terms of this agreement have been complied with, or to inquire as to the necessity or expediency of any act of the trustees. Every instrument executed by the Board of Trustees or by its direction shall be conclusive in favor of every person who relies on it, that (A) at the time of the delivery of the instrument this trust agreement was in full force and effect, (B) the instrument was executed in accordance with the terms and conditions of this agreement, and (C) the Board was duly authorized to execute the instrument or direct its execution.

Section 2.

The duties, responsibilities, liabilities and disabilities of any trustee under this agreement shall be determined solely by the express provisions of the agreement and no further duties, responsibilities, liabilities or disabilities shall be implied or imposed.

Section 3.

The trustees shall incur no liability, either collectively or individually, in acting upon any papers, documents, data or information believed by them to be genuine and accurate and to have been made, executed, delivered or

assembled by the proper parties. The trustees may delegate any of their ministerial powers or duties to any of their agents or employees. No trustee shall incur any liability for simple negligence, oversight or carelessness in connection with the performance of his duties as such trustee. No trustee shall be liable for the act or omission of any other trustee. The Fund shall exonerate, reimburse and save harmless the trustees, individually and collectively, against any and all liabilities and reasonable expenses arising out of the trusteeship, except (as to the individual trustee or trustees directly involved) for expenses or liabilities arising out of wilful misconduct or gross negligence. No expense shall be deemed reasonable under this section unless and until approved by the Board of Trustees.

Section 4.

Neither the Employers, any signatory association, the individual employers, the Union, nor any of the trustees shall be responsible or liable for:

(A) The validity of this trust agreement or the Health and Welfare Plan.

(B) The form, validity, sufficiency, or effect of any contract or policy for health and welfare benefits which may be entered into.

(C) Any delay occasioned by any restriction or provision in this trust agreement, the Health and Welfare Plan, the rules and regulations of the Board of Trustees issued hereunder, any contract or policy procured in the course of the administration of the Fund, or by any other proper procedure in such administration; provided, however, that this clause shall not excuse any violation of any of the collective bargaining agreements.

(D) The making or retention of any deposit or investment of the Fund, or any portion thereof, or the disposition of any such investment, or the failure to make any investment of the Fund, or any portion thereof, or any loss or diminution of the Fund, except as to the particular person involved, such loss as may be due to the gross neglect or wilful misconduct of such person.

Section 5.

Neither the Employers, any signatory association, any individual employer, nor the Union shall be liable in any respect for any of the obligations or acts of the trustees because such trustees are in any way associated with any such Employers, association, individual employer or Union.

Section 6.

Each trustee shall be reimbursed out of the Fund for the expenses of attendance at each meeting of the Board of Trustees at the rate of ten cents per mile traveled by the trustee to attend the meeting, computed from and to the residence of the trustee, plus a flat amount of twenty-five dollars per meeting. The flat amount of twenty-five dollars shall be paid with respect to only one meeting in any one calendar month.

Section 7.

Any trustee who resigns or is removed from office shall forthwith turn over to the Chairman or Co-Chairman of the Board of Trustees at the principal office of the Fund any and all records, books, documents, moneys and other property in his possession or under his control which belong to the Fund or which were received by him in his capacity as such trustee.

Section 8.

No decision shall be made by the Board of Trustees in the administration of the Fund or Health and Welfare Plan which is unreasonably discriminatory under the provisions of the Internal Revenue Code, or under any other applicable law or regulation.

Section 9.

The name of the Fund may be used to designate the Trustees collectively and all instruments may be effected by the Board of Trustees in such name.

ARTICLE VII.

Arbitration

Section 1.

In the event that the trustees deadlock on any matter arising in connection with the administration of the Fund or the Health and Welfare Plan, they shall agree upon a neutral person to serve as an impartial umpire to decide the dispute. The Employer Trustees and the Employee Trustees may, by mutual agreement, select an equal number of representatives from their respective trustee groups to sit with the umpire to constitute a Board of Arbitration. If such is done, the decision of a majority of this Board shall be final and binding upon the trustees and the parties and beneficiaries of this agreement and of the Health and Welfare Plan. Otherwise, the decision of the impartial umpire shall be final and binding upon the trustees, the parties and the beneficiaries of the agreement and the Health and Welfare Plan. Any matter in dispute and to be arbitrated shall be submitted to the Board of Arbitration or the impartial umpire, as the case may be, in writing, and in making its or his decision, the Board or umpire shall be bound by the provisions of this agreement, the Health and Welfare Plan and the collective bargaining agreements and shall have no authority to alter or amend the terms of any thereof. If the trustees cannot jointly agree upon a statement submitting said matter to arbitration, each group shall prepare and state in writing its version of the dispute and the question or questions involved. The decision of the Board of Arbitration or the impartial umpire, as the case may be, shall be rendered in writing within 10 days after the submission of the dispute.

Section 2.

If no agreement on an impartial umpire is reached within ten days, or within such further time as the trustees may allow for such purpose by mutual agreement, such umpire shall, on petition of either the Employee Trustees or the Employer Trustees, be appointed by the United

States District Court for the Northern District of California.

Section 3.

The reasonable expenses of any such arbitration, including any necessary court proceedings to secure the appointment of an umpire or the enforcement of the arbitration award (excluding the fees and expenses of witnesses called by the parties and the cost of any attorneys other than the Fund attorneys selected pursuant to section 5 (c) of Article IV), shall be a proper charge against the Fund. No expenses shall be deemed reasonable under this section unless and until approved by the Board of Trustees.

Section 4.

No matter in connection with the interpretation or enforcement of any collective bargaining agreement shall be subject to arbitration under this Article. No matter which is subject to arbitration under this Article shall be subject to the grievance procedure or any other arbitration procedure provided in any of the collective bargaining agreements.

ARTICLE VIII.
General Provisions

Section 1.

Subject to the provisions of the collective bargaining agreements, the rights and duties of all parties, including the Employers, the signatory associations, the individual employers, the Union, the employees and the trustees, shall be governed by the provisions of this agreement and the Health and Welfare Plan and any insurance policies or contracts procured or executed pursuant to this agreement.

Section 2.

No employee or other beneficiary shall have any right or claim to benefits under the Health and Welfare Plan, except as specified in the policy or policies, of contract or contracts, procured or entered into pursuant to section 4 of Article IV. Any dispute as to eligibility, type, amount

or duration of benefit shall be resolved by the appropriate insurance carrier or service organization under and pursuant to the policy or contract, and the employee or other beneficiary shall have no right or claim with respect thereto against the Fund or the trustees. Neither the Employers, any signatory association, the Union nor any of the trustees shall be liable for the failure or omission for any reason to pay any benefits under the Health and Welfare Plan.

Section 3.

Any notice required to be given under the terms of this agreement shall be deemed to have been duly served if delivered personally to the person to be notified in writing, or if mailed in a sealed envelope, postage prepaid, to such person at his last known address, as shown in the records of the Fund, or if sent by wire to such person at said last known address.

Section 4.

This agreement shall be binding upon and inure to the benefit of all individual employers who are now or hereafter may become members of Employers or any signatory association, and the heirs, executors, administrators, successors, purchasers and assigns of the Employers, any signatory association, any individual employer, the Union, and the trustees.

Section 5.

All questions pertaining to this agreement, the Fund or the Health and Welfare Plan, and their validity, administration and construction, shall be determined in accordance with the laws of the State of California and with any pertinent laws of the United States.

Section 6.

If any provision of this trust agreement, the Health and Welfare Plan, the rules and regulations made pursuant thereto, or any step in the administration of the Fund or the Health and Welfare Plan is held to be illegal or invalid for any reason, such illegality or invalidity shall not affect the remaining portions of the agreement, the Plan or the rules and regulations, unless such illegality or in-

validity prevents accomplishment of the objectives and purposes of the agreement and the Plan. In the event of any such holding, the parties will immediately commence negotiations to remedy any such defect.

Section 7.

Except to the extent necessary for the proper administration of the Fund or the Health and Welfare Plan, all books, records, papers, reports, documents, or other information obtained with respect to the Fund or the Plan shall be confidential and shall not be made public or used for any other purposes. Nothing in this section shall prohibit the preparation and publication of statistical data and summary reports with respect to the operations of the Fund and the Plan.

ARTICLE IX.
Non-Member Employer

Section 1.

Any individual employer who is not a member of or represented by Employers or a signatory association but who is performing work coming within the jurisdiction of the Union may become a party to this agreement by executing in writing and depositing with the Board of Trustees his or its acceptance of the terms of this agreement, in a form acceptable to the Board.

Section 2.

Any individual employer who executes and deposits any such written acceptance, or who in fact makes one or more contributions to the Fund, assumes and shall be bound by all of the obligations imposed by this trust agreement upon the individual employer, is entitled to all rights under this agreement and is otherwise subject to it in all respects.

ARTICLE X.
Amendment and Termination

Section 1.

The provisions of this trust agreement may be amended or modified at any time, and from time to time, by mutual agreement of the Employers and the Union subject to the

terms and conditions of the collective bargaining agreements and any applicable law or regulation.

Section 2.

The provisions of this trust agreement shall continue in effect during the term of the collective bargaining agreements, and any renewals or extensions thereof with respect to such collective bargaining agreements as provide for the continuation of payments into the Fund and of the Health and Welfare Plan.

Section 3.

This agreement may be terminated by the Employers and the Union by an instrument in writing executed by mutual consent at any time.

Section 4.

In no event shall the trust established by this agreement continue for a longer period than is permitted by law.

Section 5.

Upon the termination of the trust herein provided, any and all moneys remaining in the Fund after the payment of all expenses shall be used for the continuance of one or more benefits of the type provided by the Health and Welfare Plan, until such moneys have been exhausted.

Executed as of the day and year first above written.

EMPLOYER:

Northern California Chapter, The Associated General Contractors of America, Inc.

(Sgd.) *D. Young* *President*
(Sgd.) *Winfield H. Arata* *Secretary*

Central California Chapter, The Associated General Contractors of America, Inc.

(Sgd.) *Melvin Gautier* *President*
(Sgd.) *F. G. Corker* *Secretary*

UNION:

Northern California District Council of Hod Carriers, Building and Construction Laborers of the International Hod Carriers, Building and Common Laborers' Union of America

(Sgd.) *Harry Sherman* *President*
(Sgd.) *Ronald D. Wright* *Secretary*
(Sgd.) *Chas. Robinson* *Business Representative*

SIGNATORY ASSOCIATIONS

Associated Builders of Vallejo and Solano County
By (Sgd.) *J. H. Bryant*
Associated Home Builders of the Greater East Bay, Inc.
By (Sgd.) *John I. Hennessy*
Associated Home Builders of Northern California, Inc. (Formerly known as Associated Home Builders of San Francisco, Inc.)
By (Sgd.)
Andrew F. Oddstad, Jr.
Associated Home Builders of Sacramento
By (Sgd.) *Richard Ronne*
Builders Exchange of Monterey Peninsula, Inc., General Contractors Division
By (Sgd.)
Thos. A. McGlynn, Jr.
By (Sgd.) *L. R. McWethy*
General Building Contractors Association of San Francisco
By (Sgd.) *Robert L. Wilson*
By (Sgd.) *Arthur W. Beum*
General Contractors and Builders Association of the East Bay
By (Sgd.) *Alfred J. Hopper*
By (Sgd.) *J. A. Stinson*
General Contractors Association of Contra Costa County
By (Sgd.) *Fredrick C. Krache*
General Contractors Association of Fresno
By (Sgd.) *O. C. King*
General Contractors Association of Sacramento, Inc.
By (Sgd.) *Carl K. Lawrence*
General Contractors Association of Stanislaus County
By (Sgd.) *A. C. Carroll*
Home Builders Association of Fresno
By (Sgd.) *Arthur L. Yager*
Marin Builders Association, Inc.
By (Sgd.) *Hubert A. Crocker*
By (Sgd.) *Carl S. Brown*
North Sacramento Valley General Contractors Association
By (Sgd.)
George E. McDaniel, Jr.
Peninsula General Contractors and Builders Association, Inc.
By (Sgd.) *Alec J. McKenzie*
By (Sgd.) *Harry E. Smith*
Redwood District Contractors Association
By (Sgd.) *R. W. Clopper*
Salinas Independent Contractors Club
By (Sgd.)
William M. Goodman
Santa Clara County Contractors & Builders Association
By (Sgd.) *M. J. Nicholson*
By (Sgd.) *W. B. Hamilton*
Tulare-Kings County Contractors Association
By (Sgd.) *G. W. Perry*
By (Sgd.) *A. H. Lindquist*

ACCEPTANCE OF OFFICE BY TRUSTEES

The undersigned hereby accept office as trustees appointed pursuant to the foregoing agreement and agree to act under and be subject to all of the terms and conditions of said agreement. The undersigned hereby declare that they hold the Fund created by said agreement in trust for the uses and purposes set forth in said agreement.

EMPLOYER TRUSTEES:

Harold O. Sjoberg, *Chairman*
5604 East 16th Street
Oakland, California
ANdover 1-9772

W. F. Ames, Jr.
206 Sansome Street
San Francisco, California
YUkon 6-2288

Gordon Pollock
P. O. Box 903
Sacramento, California
HIllcrest 6-3875

Carl K. Lawrence
3020 V Street
Sacramento, California
HIllcrest 6-3835

Ernest L. Clements
P. O. Box 277
Hayward, California
LOckhaven 9-7171

EMPLOYEE TRUSTEES:

Harry Sherman, *Co-Chairman*
2525 Stockton Blvd.
Sacramento, California
HIllcrest 7-9886

Lee Lalor
25 Taylor Street
San Francisco, California
PRospect 5-9316

Ronald D. Wright
611 Berrellesa Street
Martinez, California
Martinez 360

Charles Robinson
474 Valencia Street
San Francisco, California
HEmlock 1-1181

Stuart Scofield
604-10th Street
Modesto, California

[Title of District Court and Cause.]

NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT

To Hartford Accident and Indemnity Company, one of the above-named defendants, and to Messrs. Dinkelspiel & Dinkenspiel and Robert J. Drewes, Esq., its attorneys:

You and each of you will please take notice that the above-named plaintiffs will bring the attached Cross-Motion for Summary Judgment on for hearing before the Honorable Louis E. Goodman at Room 258 of the Post Office and Court House Building at Seventh and Mission Streets in the City and County of San Francisco, State of California, at 9:30 o'clock a.m. or as soon thereafter as counsel can be heard, and that the cross-motion will be based upon the pleadings and admissions of fact on file herein and the attached Memorandum of Points and Authorities.

Dated January 3, 1955.

CHARLES P. SCULLY,

JOHNSON & STANTON,

By /s/ THOMAS E. STANTON, JR.,
Attorneys for Plaintiffs.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 4, 1955.

[Title of District Court and Cause.]

CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiffs herein, by their attorneys, Charles P. Scully, Esq. and Messrs. Johnson & Stanton, hereby move the court that it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiffs' favor for the relief demanded in the amended complaint against defendant Hartford Accident and Indemnity Company on the ground that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment against said defendant as a matter of law.

Dated January 3, 1955.

CHARLES P. SCULLY, ESQ.,
JOHNSON & STANTON,
By /s/ THOMAS E. STANTON, JR.,
Attorneys for Plaintiffs.

[Endorsed]: Filed January 4, 1955.

[Title of District Court and Cause.]

ORDER RE MOTIONS FOR SUMMARY JUDGMENT

This is an action by the use-plaintiffs, under the Miller Act, 40 USC §270a, to recover from Carter Construction Company, (now defunct) and the surety on its bond, employee health and welfare con-

tributions, which a collective bargaining agreement in the construction trade required the construction company to make to the Union and which it failed to pay.

Both sides have moved for summary judgment.

It is conceded that no issue of fact is tendered.

In my opinion, the use-plaintiffs, relying, as they do, upon the doctrine favoring a liberal construction of the Miller Act, here ask the statute to be stretched far beyond the limits of its objectives and purposes. Neither the language nor the purpose of the Miller Act permits the Act to be applied as plaintiffs ask.

40 USC §270a was purposed to protect those supplying labor and materials on government jobs substantially in the same way as they are protected under state mechanics' lien laws. §270a specifically provides that the bond required to be provided by contractors is "for the protection of all persons supplying labor and material in the prosecution of the work provided for in such contract."

It is agreed here that the wages of all laborers on the specific government project, with which we are concerned, were paid in full. The payments here sought to be recovered were payments which the Construction Company, along with all other employers, was obligated to pay to the Union as a health and welfare fund for Union members, under a collective bargaining agreement. They had nothing

whatever to do with this specific government job, or, in fact, with any designated job or work.

True, the amount of contribution required of each employer was calculated at so much per hour of the time worked by employees. But that was just a mere method of calculation, nothing more. It applied to all employees for all jobs. The fund itself was a device to maintain harmonious relations between employer and Union. No part of the contributions sought to be recovered had the slightest relationship to or concerned the "prosecution of the work provided for in said contract."

No authority has been cited nor have we been able to find any, which would serve as precedent for extending the reach of the Miller Act to the radical extent sought.

Defendants' motion for summary judgment is granted. The contra motion of plaintiffs is denied.

Dated January 21, 1955.

/s/ LOUIS GOODMAN,
United States District Judge.

[Endorsed]: Filed January 21, 1955.

In the United States District Court, Northern District of California, Southern Division

No. 33521

THE UNITED STATES OF AMERICA for the Benefit and on Behalf of HARRY SHERMAN, et al.,

Plaintiffs,

vs.

DONALD G. CARTER, et al.,

Defendants.

SUMMARY JUDGMENT

The Motion for Summary Judgment pursuant to Rule 56(b) of the Rules of Civil Procedure, having been presented, and the Court being fully advised,

The Court finds that the defendant is entitled to a summary judgment as a matter of law.

It Is Therefore Ordered, adjudged and decreed that the Motion for Summary Judgment of the defendant, Hartford Accident & Indemnity Company, be, and the same is hereby granted, that the plaintiffs have and recovered nothing by their suit, that the defendant, Hartford Accident & Indemnity Company, go hence without day, and that said defendant recover its costs and charges in its behalf expended and have execution therefore.

Enter;

Dated: This 10th day of February, 1955.

/s/ LOUIS GOODMAN,
Judge of the District Court.

[Endorsed]: Filed February 10, 1955.

Entered February 11, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America for the benefit and on behalf of Harry Sherman, Chas. Robinson, Ronald D. Wright, Stuart Scofield, Lee Lalor, William Ames, Ernest Clements, Carl Lawrence, Gordon Pollock and Harold Sjoberg, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on February 11, 1955.

Dated this 12th day of February, 1955.

CHARLES P. SCULLY,

JOHNSON & STANTON,

By /s/ THOMAS E. STANTON, JR.,
Attorneys for Plaintiffs.

[Endorsed]: Filed February 16, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The points on which Plaintiffs and Appellants intend to rely on their appeal heretofore filed herein are as follows:

1. The health and welfare contributions for which suit is brought are a part of the compensation

agreed to be paid for labor supplied in the prosecution of the Government projects referred to in the complaint and they are therefore within the obligation of the payment bonds furnished by Defendant and Respondent surety.

2. The obligation of the payment-bond furnished by Defendant and Respondent surety should be construed to cover claims for health and welfare contributions for the further reason that such construction will effectuate the objective of the Miller Act to protect the Government against delays on its projects.

3. The obligation to pay liquidated damages and attorneys' fees in the event of a default is a part of the total obligation assumed by the defendant contractor in consideration for the services supplied to him, and consequently this obligation is likewise covered by the payment bond furnished by Defendant and Respondent surety.

Dated: February 23, 1955.

CHARLES P. SCULLY, ESQ.,

JOHNSON & STANTON,

By /s/ THOMAS E. STANTON, JR.,
Attorneys for Plaintiffs and
Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed February 25, 1955.

The United States District Court, Northern District of California, Southern Division

No. 33521

THE UNITED STATES OF AMERICA for the Benefit and on Behalf of HARRY SHERMAN, et al.,

Plaintiffs,

vs.

DONALD G. CARTER, et al.,

Defendants.

Before: Hon. Louis E. Goodman, Judge.

TRANSCRIPT OF ARGUMENT ON THE HEARING OF MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT

Appearances:

For the Plaintiff:

CHARLES P. SCULLY,
JOHNSON & STANTON, By
THOMAS E. STANTON, JR., ESQ.

For the Defendant:

DINKELSPIEL & DINKELSPIEL, By
ROBERT J. DREWES, ESQ.

Tuesday, January 11, 1955

Mr. Drewes: Ready, your Honor, for the Defendant Hartford.

Mr. Stanton: Ready.

The Court: This is the case that involves the question whether the health fund deductions are chargeable against the health bond.

Mr. Drewes: That is correct, whether the surety under the Miller Act is liable for payments which the contractor failed to make into the health and welfare fund of the union. As I pointed out to your Honor yesterday, there were three cases. The facts are almost identical and the issue is identical in each of the three cases.

The Court: Have you agreed that the decision in one will apply to all three?

Mr. Stanton: Yes, your Honor, a stipulation is on file.

Mr. Drewes: To review the facts very briefly, and the facts are not disputed, the contractor bound himself to a collective bargaining agreement along with all the other members of his particular employers association to make payments into the welfare fund of 7½ cents an hour for each hour worked for him by each individual employee within the classification with which we are concerned. The provisions of the trust agreement itself, to which the contractor is also a party, provides that the payments shall not be considered as [2*] wages, and that

the individual employee shall have no interest therein in any way, shape or form except as provided in the various policies of insurance, and so all, but procured by the trustees or purchased by the trustees with these accumulated funds.

Thereafter the contractor Carter contracted with the United States in all three of these cases—they all arise out of the same construction project—to build certain buildings at Travis Air Force Base and at Mather Field. All the payments, it is agreed, which the contracts with the United States provided were to be paid as wages were so paid by the contractor, and your Honor well knows in contracts of construction to which the United States is a party—and that is the case here as well, of course—the Secretary of Labor promulgates minimum wages for each area, those wages are posted on a job, and they become a part of the specifications of the contract, and the contractor binds himself not only by the contract but also by laws to pay those wages at those rates.

It is agreed that herein the contractor Carter made all of those payments in full. However, he did not make the payments which are spelled out and specified in the complaint in each of the three actions into the welfare funds and in the amounts that are prayed for in the complaint.

The welfare trust agreement also provides for attorneys [3] fees in the event the trustees find it necessary to employ counsel, and also to liquidated damages. The contractor and the unions agree that it would be difficult to determine what are damages

in the usual language in the event there was a default, and therefore they stipulate to the damages, and in all of these actions the trustees of the fund seek attorneys fees and liquidated damages.

The Court: The trustees of this fund deem themselves, in a manner of speaking, subrogated to the rights of the United States because the United States is the beneficiary under the bond?

Mr. Drewes: Yes. This is brought under the Miller Act. Jurisdiction is conferred by the Miller Act, and the Miller Act provides all such actions shall be brought in the name of the United States. Of course, the trustees are the real parties and interests in the matter. I should say to your Honor we are not making any issue here as to their right to bring the action.

The Court: It is just a question of whether the bond is liable for the payment.

Mr. Drewes: That is right, and that is deemed to be a matter of considerable importance, and we are interested only in the adjudication of that question. We are not interested in raising any question of right to sue, capacity, or any such matters. Solely the plaintiffs seek to recover the amounts [4] which were unpaid, the amounts which the welfare agreement, the trust agreement provides shall be liquidated damages, and pay attorneys fees.

The matter has never before been decided. In my memorandum I refer to the City of Portland case. The citation is there in my brief. It is the only appellant decision that I could find, your Honor, that related in any way to this particular issue.

That is the reason you will find it set forth in my memorandum of points and authorities. It has very little bearing on the issue, your Honor, so I should save you some time in urging you not to look for it because, as I say, it is there and it is the only appellant case I could find that has anything to do with this subject. And there is another case, a federal case, a district court case which is reported in Fed. Supp., which is very close, however, and that is cited. That is United States against Landis and Young, which is also cited in my brief.

Let me say, first, that in the City of Portland case, your Honor, there is the contractor on a state job for the City of Portland also furnishing a statutory bond out of the laws of Oregon, and he contracted with a medical association to furnish medical services and hospitalization to his employees while on the job, and the remuneration was based upon a per man per hour basis as well. The fee that was to be paid to the medical association was likewise correlated to man hours [5] worked.

In that case the employer, however, deducted the cost thereof from the salaries of each of the employees. He did not pay the association, and the association similarly sued the surety. However, in that case the parties agreed the bond did not cover services of that kind, so that was not an issue in the case. The medical association attempted to establish an equitable assignment and recovered on that theory, that the laborers owed the association and the contractor had withheld money.

The Court: Did the collective bargaining agree-

ment in this case contain a provision binding this contractor that wherever he employed members of the union that required him to make this payment into the welfare fund?

Mr. Drewes: That is correct.

Mr. Stanton: That is correct, your Honor. It is not limited to members of the union. You may be familiar with the Taft-Hartley requirement that you cannot discriminate between employees. It is not limited to union members. It is employees covered by collective bargaining agreements.

The Court: Wherever a contractor has employees who are covered by the collective bargaining agreement he has the obligation under the agreement to pay this percentage into the health fund?

Mr. Drewes: That is right. The carpenters have work [6] jurisdiction. Anybody who performs carpenter work on construction projects for these contractors they must pay.

The Court: It is not limited to any particular job, but any work the contractor does, employing these people who are covered by the collective bargaining agreement.

Mr. Drewes: Yes. So in the City of Portland case the parties had agreed that no action were lie against the surety for medical benefits of this particular kind, and the medical association tried to establish an equitable assignment, and the Court simply said there was no obligation on the part of the employees to pay the medical association anyway under any circumstance. It was purely an obliga-

tion by contract of the employer, and refused to find on any basis for equitable assignment. So the parties having agreed to the issues before this Court, it is of very little help.

In the Landis and Young case, however I feel that is a good deal more persuasive and we will rely on that to a considerable extent. In that case the claimant was another insurance company to whom the contractor owed premiums for employers liability insurance and he had not paid it. And so there were a number of parties. As a matter of fact, the insurance company claimant was in intervener. They intervened in a suit, came in and said, "We have not been paid our premiums on this insurance policy. We are entitled to recover because we have furnished medical services and hospitalization [7] which were used in the prosecution of the work," which I conceive is very close to the issue that is before your Honor, and the judge in that case said, "No." He said he could not go along with them. He said the furnishing of medical benefits of that kind added nothing of value to the construction and it was only in the nature by analogy to the repair of the equipment, that he failed to see how furnishing medical benefits to the laborers in any way forwarded the prosecution of the work. At best it kept them working, because though a machine had broken down and a repairman was called in to fix it up; to that extent the repaired machine could then be used, and the work was forwarded, but only in that indirect way.

The judge said he could scarcely conceive a man who had worked repairing a machine which had

broken down on a job could assert a mechanic's lien against the job. Similarly I fail to see how a doctor or a medical association or one furnishing medical benefits of this kind can come in and say, "We have added something. We have furnished labor in the prosecution of the work." So I feel the Landis and Young case is very close to the one before this Court.

There being on the books no holding in the matter we rest our case on this, that the medical and welfare benefits of this kind may not be recovered from the surety because they fall neither within the letter of the Miller Act nor are they within its spirit. The Miller Act and the bond which the [8] defendant partly furnished in this case, one provides and the other is conditioned upon that all those persons who furnished labor in the prosecution of the work provided for in the contract shall be paid in full. So it appears that before a claimant may recover, he must show that he furnished labor firstly; and secondly, it was in the prosecution of the works; and thirdly, it was provided for in the contract.

As against those positive requirements of the statute, it does not appear that the plaintiffs in this action can recover for the reason that those for whom they sue, the individual workman, has been paid in full. It is not contested that they were paid the full wages, which it was required that the contractor pay them under the contract. The benefits which they were to receive are not wages to paid them for the prosecution of the work but are classed in that very broad class which are usually called

"shop" conditions or conditions of work rather than wages. Your Honor well knows that the range of things for which employers and employees bargain in these times is extremely extensive.

The Court: Of course, there might well be a distinction between so-called conditions of work that are not translatable into the payment of money as distinguished from those that are. I suppose the argument can be made that this payment into the health benefit fund is a part of the wages of the employee but that the employer, instead of paying it to the workman who pays [9] it into the fund, pays it directly to the fund. Maybe that will be a contention. I do not know.

Mr. Drewes: I am sure that Mr. Stanton will advance that particular point. That is the obvious argument on the other side of the picture. Our position is it is not wages. There is nothing that is presently due the workmen as a result of their labor. By their own agreement they have no present interest in it, they have only a beneficial interest in the proceeds or the right to participate at some time in the future upon condition.

The Court: It is a benevolent condition that pertains to all the workers and not any particular one.

Mr. Drewes: Yes. I want to pursue that a little further and this I think is of the essence. I mention this but I do not spell it out in my brief. The construction industry, as your Honor very well knows, is characterized by hourly employment and by a highly fluctuating employment, not only on a job

basis, but on a seasonal basis. The provision in the welfare agreement that the 7½ cents an hour be paid, I contend, was probably convenient and possibly the only method adopted by the parties to relate the amount or the benefits to be conferred to the conditions of employment of the industry. In other words, it was a convenient means of measuring the benefit that was adopted by the parties on the amount of the benefit, but they could have adopted another just as easily. [10] Suppose the parties had agreed as a result of the collective bargaining that the contractor would provide a policy of insurance for medical services on a particular job. That is as was done in the City of Portland situation. The point I am trying to make is that the method that was used by the parties here gives it a certainty, the appearance of a wage because it is fixed in amount and it is easy to be ascertained.

The Court: This is a health and benefit fund.

Mr. Drewes: Yes.

The Court: Out of which the employees get taken care of in case of illness and also—what other purposes does the fund have?

Mr. Stanton: Your Honor, it provides life insurance, it provides accidental death and dismembermen. insurance, it provides hospitalization and surgical on a scheduled basis, reimbursement of surgical fees; the laborer's fund that we are now dealing with also provides x-ray reimbursement benefits and what is called a supplemental accident benefit up to $300. That is the type of thing that these funds buy. Their authority extends to any-

thing that would fall within the concept of life insurance and health and accident insurance.

The Court: A member of the union, one who is a beneficiary of the provisions of the collective bargaining agreement, would have a right to get benefits from that fund even if he was not working, wouldn't he? [11]

Mr. Stanton: That is correct.

The Court: Suppose he worked on one job, did not work for a month, and then went on another job. In the interval between jobs would he be entitled to the benefits of that contract?

Mr. Stanton: He must work a certain number of hours to become eligible. In the carpenters fund they must work 400 hours in a six month period.

The Court: You do not mind my interrupting to get these facts?

Mr. Drewes: Of course not.

Mr. Stanton: I am sorry. I said carpenters fund. In the laborers fund. It has been for some time, since that started, 400 hours in a six month period. A man who has worked that number of hours, regardless of the employers he has worked for, so long as that number of employers has paid a total of 400 hours into the fund, the man is entitled to the insurance protection for the succeeding six-month period. He gets it regardless whether he continues to work in the industry. Of course, he has to continue working to acquire eligibility for the next six month period. It is a continuing proposition. He has some definite benefits established as soon as he works 400 hours.

The Court: As a practical matter, Mr. Stanton, how is it this contractor did not pay this [12] amount?

Mr. Stanton: He pays it——

The Court: He did not pay these particular amounts.

Mr. Stanton: That is right. He is bankrupt.

Mr. Drewes: He is not in business. He is bankrupt.

The Court: I did not think this case would be here if he were still in business.

Mr. Stanton: That is correct, your Honor.

Mr. Drewes: My point is that the particular method that the parties used to measure benefits that the contractor was to give to the employees should not mislead us to divert our attention from the principle involved, and the principle is whether or not these benefits constituted labor furnished in the prosecution of the work provided for in the contract. Surely the contractor, if the parties had so agreed, could have provided these benefits in a somewhat unsatisfactory way by hiring a doctor and directing the employees to a nearby hospital at his own expense, that is, any of the workmen who had been injured on the job. I mean there are other ways to accomplish this particular objective which, had they been adopted, would have put the picture in more perspective. Sir, my position is that these benefits are not related to the work at all, and my authority for that is the Landis-Young case, which is the only case I have been able to find which was decided on facts such as these.

The only other point is benefits of this kind should be [13] recoverable because they are not within the spirit of the Miller Act. The purpose of the Miller Act, as has been said, is to provide for those who are furnishing materials and supplies for a government job of the same protection that is given to persons similarly situated by the mechanic's lien laws of the states, and the theory of the mechanic's lien laws of the states, it has been said, is to protect those who have created value, who by their work or by their services have created something of value on the land of the one who has ordered the work be done. And so we think in principle, too, it can be shown that the value which these workers have contributed to the works which were erected on the property of the United States they have been compensated for in full through their wages and benefits which the contractor bound himself to give are not wages but pertain to the conditions of employment, just as there are many others—the furnishing of work clothes or the furnishing of company houses. There are many other benefits of employment which clearly do not create value or add anything to the value of the construction. Our authority is also Landis and Young. That reasoning is advanced in that particular case.

Mr. Stanton: Your Honor, I want to dwell a bit on the nature of these payments, that we are suing for. I want to make it clear that we are not suing for the benefits. That is something that is established under insurance policies which the funds

have negotiated. We have not premised our [14] suit on any theory that there have been any supplies furnished in connection with this job. The Miller Act provides that the bond shall provide that the contractor and the surety agree to pay for the services and supplies or labor and supplies furnished in connection with the prosecution of the work. That is the statutory language, or it is very close to it. It says nothing about the payment of wages. It is an obligation to pay for labor, and the Court of Appeals of this circuit in a case which we quoted in a brief has said that that obligation is to pay in full. The obligation we seek to enforce, the principle obligation, is the 7½ cents that was due to the fund. That is a definite amount. It is measured by the hours worked. It seems to us so clear that it is a part of the consideration for the services performed that it is a little difficult to start any argument on that point, but I did face in arguing the matter before the Municipal Court the impression which the judge had that unless I could bring it within the concept of wages I was out of court.

In connection with that attention was drawn to the provision in the trust agreement which Mr. Drewes has quoted to the Court. The trust agreement is attached as an exhibit to the stipulated facts. In that trust agreement there is a section, and since the wording of it has some bearing on the argument, I will read it. It is short:

"Contributions to the fund shall not constitute [15] or be deemed to be wages——

and I will go on because this is the pertinent language——

> "wages due to the employees with respect to whose work such payments are made, and no employee shall be entitled to receive any part of the contributions made or required to be made to the fund in lieu of the benefits provided by the health and welfare fund."

Then in a subsequent provision of the trust agreement which I have referred to in the brief you will find a provision which says the rights of employees are limited to the payments payable under these contracts, insurance policies which have been negotiated by the fund.

There is reason for that provision. As these funds are set up in the construction industry it is not possible to provide the benefits for the man who works only ten hours. The amount of money that is paid in with the respect to such a man would not be adequate to provide the type of protection that would be of any value to the man. The funds have been negotiated so there is this eligibilty requirement, which is a matter worked out by trustees of both the carpenters and laborers funds at the present time. It is 400 hours within a six-month period, which is a pretty liberal—when I say "liberal," that is not very much to require when you consider the funds cover the 46 counties of northern California, so that any construction work that is performed, unless it be a single [16] job, by what might be called an independent contractor who has

not been reached by the union, the contractor is obligated to pay into this fund. The man-hours go into a credit on his account when the six-month period is up. He then has coverage. He is advised of his coverage. He is furnished a certificate, an insurance certificate which gives him evidence of his coverage, and whenever his claim comes up it is paid. They are in active operation.

The Court: Assuming that an employer who is a party to this agreement did not pay his required amount, and assuming a union did not take direct action against him, they could maintain a suit, I assume, to recover from the employer these amounts of money?

Mr. Stanton: The union could maintain?

The Court: Someone could.

Mr. Stanton: The trustees could, your Honor.

The Court: The trustees could maintain a suit to recover from the employer this amount of money.

Mr. Stanton: Yes, and this is a suit to recover the contributions due from this particular employer with respect to hours that were worked on these government contracts. The surety has been joined because of his obligation, which we contend is covered within the scope of his bond, the surety's bond. It is a bond to pay the contributions that were due with respect to work that is performed on particular projects. [17]

The Court: Suppose a contractor was building a building for me and he did not pay into that fund. Would there be a lien on my property?

Would the trustees have a right to a lien on my property?

Mr. Stanton: A mechanic's lien, your Honor? We have not attempted to enforce a lien. Certainly it is a part of the consideration to be paid for labor. Whether we can bring ourselves within the——

The Court: Suppose, as I say, I had a contractor to build a building for me and the contractor did not pay that. My contract provides that he furnish all of the labor and materials for that job for which I pay him a certain amount of money.

Mr. Stanton: Yes.

The Court: Is it any concern of mine what he has to pay to get labor?

Mr. Stanton: It is ultimately. If he does not pay and liens are filed, because the lien is for the amount that he had agreed to pay.

The Court: Suppose he agreed to pay the labor the union a dollar a man for some fund.

He was using for some beneficial purpose for the men. He agreed to pay the union a dollar a man for every man that they furnished to work on my building. Would that be something for which I was obligated to pay unless it was provided for in my contract, any more than I would have to pay for the salary [18] of his advertising man, the contractor's advertising man, his accountant, or anything else? There might be a distinction there.

Mr. Stanton: This is distinctive from his ad-

.vertising, his overhead obligations. He would have to pay the subcontractor.

The Court: He might have employed a man whose business it was to get the proper men from the union.

Mr. Stanton: If his work is related to your project, yes.

The Court: I would not be liable for the payment of that specific money because my obligation is limited to pay the contractor his price. The protection that I get under the mechanic's lien law and that is afforded by the Miller Act is that I do not get stuck for the payment of those who would have a lien on my property for services rendered. That is a theory of the mechanic's lien law.

Mr. Stanton: That is a theory of the mechanic's lien law. It is not necessarily a complete answer to the Miller Act.

The Court: It may be that has a broader indication to it because of the fact that public work is involved in it, and there may be public policy interwoven with it. Suppose in this case, Mr. Stanton, instead of the employer contracting to pay 7½ cents an hour into this fund that he contracted to have a doctor present to administer to the health of these men—that was in his collective bargaining agreement—that he broke [19] that and the union had to furnish a doctor: Would the contractor's breach of the agreement and the consequent cost of doing that which the contractor had agreed to do in furnishing a doctor become a lien on the property?

Mr. Stanton: I think it would, your Honor. I do not have the answer.

The Court: I'm just asking these questions rhetorically to try to see what the reasoning is.

Mr. Stanton: The question whether a foreman's compensation is to be covered by the California mechanic's lien law went to the California Supreme Court rather recently and they said, yes, his services were labor within the meaning of the mechanic's lien law. Whether they would go farther and say a doctor hired——

The Court: I can follow that. If the doctor was not paid he would have a claim against the contractor, and it might properly be held there that was a lien against the property, because of the contribution he is making toward the building.

Mr. Stanton: Your Honor is pointing out something I want to make clear. The trustees are suing on the right of the laborers.

The Court: I understand.

Mr. Stanton: The thing that points that up very clearly is the way Congress has approached these funds. The Taft-Hartley Act, Section 302, sets up certain requirements. The major one is that these funds be placed in the hands of trustees and [20] administered as such. I have quoted in the memorandum the statement which explains why that is the case. The gist of it is that in the eyes of Congress this money that goes into these funds is a part of the consideration paid for the services of the man, and Congress so understood in being sure that the man got the benefit of those payments that

there was no diversion by union officials. But there could be other things that would take place if the fund were not in the hands of trustees and under the obligation of the trustees——

The Court: Those are matters which pertain to the relationship between an employer and employee. There is a different policy behind that. Here we have a narrower question as to whether or not somebody else can be compelled to pay for that, that somebody else being the owner of the building. The person for whom the construction work is done would be chargeable under this theory you are propounding for the performance of an agreement between an employer and an employee. That has its genesis in the field of public policy for the general regulation and maintainance of relations between employer and employee. I do not think the burden of that ever shifts to the man with whom a contract is made to erect a structure unless it is directly made a provision of a contract. I do not see how that could be made. What has happened here is the employer and employee have entered into an agreement in order to fix the standards that usually exist as between the employer [21] and employee in all their relationships, provided the employee and employer both contribute something.

Mr. Stanton: The employee does not contribute.

The Court: The employer has to contribute to this fund as one of the requirements of the relationship between the employer and the employee, and that arises out of their relationship to one an-

other. It is pretty hard for me to see how you can carry that as a cost of a particular building. That is part of the employer's general overhead and cost of doing business, just as he has to carry insurance to protect himself, like he has to carry other burdens which go to the carrying out of his business generally without relation to any particular contract.

Mr. Stanton: This is directly related to the labor that is performed, your Honor.

The Court: It is measured according to the wages paid but it arises out of the relationship.

Mr. Stanton: There are other connections, your Honor. It is negotiated at the same time in the same agreement that the wage rates are negotiated. I do not think there could be any dispute that as far as the wage rates are concerned, that the wages that are paid are recoverable if they are not paid by the contractor from the surety.

The Court: Oh yes. That is the wages and compensation for the labor performed upon the stucture. [22]

Mr. Stanton: And the particular wage rate that is worked out by the collective bargaining agreement.

The Court: Whatever those wages are they are recoverable.

Mr. Stanton: In other words, if they negotiate a 15 cent increase and that work is done during the period when that increase becomes effective, that is a cost of the labor. We take the position flatly that this 7½ cents is also a part of the cost

of the labor. It is negotiated by the unions on behalf of the employees. They are speaking for the employees in this particular case. The money, while it is being paid by the employer to the fund rather than directly to the employee, and while it is not set up as a deduction from the employee's wage, still it is a matter that is bargained, and I can assure you——

The Court: He does not have to pay income tax on that.

Mr. Stanton: That is correct, your Honor. By virtue of the provisions of the internal revenue code; it could have been the other way, because there are certainly benefits, that if the money were paid directly to the man he would not be able to deduct what he paid out if he had bought the insurance. He would not be entitled to deduct whatever he paid out in premiums for this insurance in computing his personal income tax. So in another way of handling the procurement of these benefits there could be an income tax incident falling upon the employee. But that is not the case under these funds. [23]

The Court: Very frankly I do not think this case is of too much importance because it is not a thing that is very likely to happen.

Mr. Stanton: It does not happen as long as the job has to go on, because if the surety is paying the bill and sees that these welfare funds are paid —because, as I pointed out in our brief, being a part of the collective bargaining agreement, the unions take the position that when the contribu-

tions are not paid, it constitutes a breach of the collective bargaining agreement and they have asserted the right to strike.

The Court: How are the contractors required to pay these amounts? On a monthly basis, quarterly basis?

Mr. Stanton: Monthly.

The Court: And, of course, the regular wages are paid most of the time weekly.

Mr. Stanton: Yes. I do not know whether it is a requirement of the federal law, but most of the collective bargaining agreements provide for payment weekly, and I am sure that is the practice. We do have defaults though, and with a fund as large as the carpenter's fund, for instance, in which 40,000 men are reported on and 6 or 7,000 contractors pay into the fund or record into the fund for an hour or more, while the individual case may not involve a great deal, still, particularly with the Miller Act—there was a revision when the Miller [24] Act was adopted, I think, back in 1940, but at any rate it had predecessors, and congressional action may not change as easily perhaps as a state action can be changed. The construction of the act becomes important, and your Honor will see from the authorities we cite in the brief the Supreme Court has definitely said the Miller Act is to be construed liberally, and we have cited your Honor to one case arising recently, a Court of Appeals case, in favor of the supplier. They hold that the supplier was entitled to the protection of the act where he had supplied the material to a con-

tractor to replace material which the contractor used on a government job. In other words, the supplies for which the claimant was allowed had not actually gone into the job but on a liberal construction it was shown——

The Court: The evidence must have been pretty clear. That is a pretty far-fetched document.

Mr. Stanton: When you analyze the fact that a railroad is entitled to a claim for freight on goods shipped to a job, and the Supreme Court held—admittedly liberal interpretation of the Miller Act—but when you read those cases you realize——

The Court: The railroad is a closer; that is a closer picture.

Mr. Stanton: They did it under the theory that it was labor, and the operation of the engines constituted labor, which is a pretty broad stretching of the language of the act, [25] and an early Supreme Court decision, which we have cited and quoted, says that you must give attention to the spirit of the act as well as the letter, and when you analyze the cases that have been decided, the Supreme Court cases, it seems pretty clear that the Court has gone very far under the Miller Act in giving protection to grocerymen who supply supplies to workmen who have worked on projects.

The Court: May I interrupt again? Was this cost-plus contract with the government, do you happen to know?

Mr. Drewes: My best recollection is it was a lump sum. I am not certain about that. I have the

contracts in my office. They are fairly recent contracts. They are not old contracts.

Mr. Stanton: I am sure it was, your Honor. Then another Supreme Court case, which is cited in the memorandum, where the argument was made —it was the railroad reimbursement for freight— the argument was made, well, the railroad does not need this claim under the bond. It is protected by its lien. It can enforce its lien. The Supreme Court pointed out and referred to an opinion of the Circuit Court, which also pointed out that, true, the railroad might enforce its lien, but if it did enforce its lien it would follow the job, and one of the other basic purposes of the Mortgage Act is to protect the government from delays. As pointed out in the memorandum, we feel that that decision and that language is very pertinent to our case because, since it is a negotiated [26] provision of the collective bargaining agreement, and the unions have asserted and, as far as we know, and we represent employers in other matters, there is no practical way in which to prevent them from taking action where they can legitimately claim that the collective bargaining agreement has been breached to withhold a workman. So it is of importance to the government in carrying out that aspect of the Miller Act to hold that these contributions are within the protection of the bond.

Counsel has cited a number of authorities in this memorandum. He has relied principally upon the Landis case, which involved workmen's compensation and premiums. I believe he cited one or two

other authorities that also hold that workmen's compensation premiums are not recoverable by the insurance company under a Miller Act bond. We distinguish those cases by the fact, at least in California, under the California law an employer is prohibited by law from including or deducting or any anyway—I do not want to misquote the statute; I have quoted it in the memorandum—charging workmen's compensation premiums to the compensation of the workman with respect to whom the insurance is secured. That is tied in with the policy and theory behind the workman's compensation act. In other words, Section 3751 of the California labor code prohibits the making or taking any deduction from the earnings of any employee, either directly or indirectly [27] to cover the whole or any part of its workmen's compensation obligation, which seems to us clearly sets the workmen's compensation obligation apart from any compensation for labor. On the other hand we feel that these contributions to the welfare fund, negotiated by the representative of the employees as a part of the collective baraining agreement that provides the wages the men have, is a consideration for the services provided.

Your Honor referred to the fact that it was a sort of a general thing not related to the particular job. That could be true on a small government project. On a major government project that goes on for two or three years that would be even substantially less true, and as you know, government projects tend to be large. It is certainly related

directly to the work the man does. If all he does during this six-month period is work on government projects for one or more contractors doing government work, he gets no benefit unless payments are made into the fund on his behalf and they relate it to the hours that he works.

As pointed out in the memorandum, we also claim for liquidated damages, and the attorneys fees, and we claim them as part of the total obligation of the contractor for labor, and we take the position that on the authorities that exist in this field in construing the Miller Act, No. 1, to carry out the policy of seeing that laborers are paid in full, this [28] type of contribution should be held to be within the bond and, No. 2, to carry out the policy to protect the government against delays this contribution should be held within the obligation of the bond.

The Court: I understand the situation unless you want to add something.

Mr. Drewes: No. I believe your Honor understands the problem clearly.

The Court: I will look at the memorandums you filed.

Mr. Drewes: With respect to the attorneys fees you will find three cases on the subject cited, both in Mr. Stanton's brief and in mine. With respect to liquidated damages our position is that the surety is not bound by agreement between the contractor and the union, and it is the universal rule that a surety is not liable for liquidated damages, but the authorities are cited in our briefs, your Honor.

Just one other point. The counsel states that one of the purposes of the Miller Act is to avoid delays on a job, and as I stated in my brief, your Honor, the short answer to that is the Miller Act also requires a performance bond, which was duly executed and furnished by Carter, and it is an exhibit to our brief statement of facts and that is conditioned on completion of a job within the time allowed, and I had comments under various cases in connection with the allowance of freight, and so on. I do not believe they are material to [29] the issues here. The Landis and Young case, as I pointed out to you in my opening argument, was an action in which the carrier sought to recover unpaid premiums, contending it had furnished similar services, and it is cited only for the principle. I call your Honor's attention that another district judge was of the opinion that benefits of this kind did not add any value to the job, were not lienable, and were not furnished in the prosecution of the work. It is quite true, as Mr. Stanton states, that the Supreme Court has held, and the courts generally have held that the Miller Act is to be liberally construed, but nevertheless the liability of the assured is limited to the provision of the statute that those furnishing supplies and labor in the prosecution of the work provided for in the contract shall be paid in full, and we contend, of course, they have been paid in full in this case for such labor as they furnished in the prosecution of the work. And so we will submit the matter, your Honor.

The Court: Mark it submitted.

Certificate of Reporter

I (We,) Official Reporters(s) and Official Reporter(s) pro tem certify that the foregoing transcript of 30 pages is a true and correct transcript of the matter therein contained as reported by me (us) and thereafter reduced to typewriting to the best of my (our) ability.

/s/ [Indistinguishable.]

[Endorsed]: Filed April 7, 1955. [30]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this court in the above-entitled case; and that they constitute the record on appeal herein as designated by the parties:

Amended Complaint.

Notice of Motion and Motion for Summary Judgment.

Admissions of Facts for Purposes of Motions for Summary Judgment.

Notice of Cross-Motion for Summary Judgment.

Cross-Motion for Summary Judgment.

Order Re Motions for Summary Judgment.

Summary Judgment.

Notice of Appeal.

Cost Bond on Appeal.

Designation of Record by Plaintiffs and Appellants.

Statement of Points on Appeal.

Designation of Record by Defendants and Appellees.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 28th day of March, 1955.

C. W. CALBREATH,
Clerk;

By /s/ WM. C. ROBB,
Deputy Clerk.

[Endorsed]: No. 14703. United States Court of Appeals for the Ninth Circuit. United States of America for the Benefit and on Behalf of Harry Sherman, Chas. Robinson, Ronald D. Wright, Stuart Scofield, Lee Lalor, William Ames, Ernest Clements, Carl Lawrence, Gordon Pollock and Harold Sjoberg, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California, Appellant, vs. Donald G. Carter, Individually; Donald G. Carter, Doing Business as Carter Construction Company, Carter Construction Company and Hartford Accident and Indemnity Co., Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 28, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit

No. 14703

THE UNITED STATES OF AMERICA for the Benefit and on Behalf of HARRY SHERMAN, et al.,

Plaintiffs and Appellants,

vs,

DONALD G. CARTER, et al.,

Defendants and Appellees.

APPELLANTS' STATEMENT OF POINTS ON APPEAL AND DESIGNATION OF RECORD FOR PRINTING ON APPEAL

Appellants hereby adopt the statement of points on appeal and the designation of record heretofore filed by them in the above-entitled proceeding with the United States District Court, Northern District of California, Southern Division, and appearing in the typed record herein, as Appellants' Statement of Points and Designation of Record for Printing on Appeal pursuant to Paragraph 6 of Rule 17 of the Rules of Practice of the above-entitled court.

Dated March 31, 1955.

CHARLES P. SCULLY,
JOHNSON & STANTON,

By /s/ THOMAS E. STANTON, JR.,
Attorneys for Plaintiffs and Appellants.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 2, 1955.

[fol. 61B] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—December 8, 1955 (omitted in printing)

[fol. 62] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: Healy and Lemmon, Circuit Judges, and Byrne, District Judge.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—January 10, 1956

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 63] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14,703

UNITED STATES OF AMERICA for the Benefit and on Behalf of Harry Sherman, Chas. Robinson, Ronald D. Wright, Stuart Scofield, Lee Lalor, William Ames, Ernest Clements, Carl Lawrence, Gordon Pollock and Harold Sjoberg, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California, Appellants,

vs.

DONALD G. CARTER, Individually; DONALD G. CARTER, Doing Business as Carter Construction Company, CARTER CONSTRUCTION COMPANY and HARTFORD ACCIDENT AND INDEMNITY CO., Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division

Before: HEALY and LEMMON, Circuit Judges, and BYRNE, District Judge.

OPINION—January 10, 1956

BYRNE, District Judge

Appellants filed suit on a bond furnished by Carter, as contractor, and executed by Hartford Accident and Indem-

nity Company, as surety, pursuant to the provisions of the Miller Act (40 U.S.C. 270(a) et seq.) to recover health and welfare contributions alleged to be due on account of labor performed on public work of the United States. The District Court granted Hartford's motion for summary judgment and this appeal followed.

The material facts which are not in dispute may be summarized as follows: Carter as general contractor entered [fol 64] into two written contracts with the United States of America for the construction of certain buildings at Travis Air Force Base and Mather Field in California. Under the terms of the contracts Carter was required to furnish the materials and pay the labor at wage rates set forth in the specifications which were a part of the contracts. Under the terms of the bond Hartford was obliged to make these payments in the event Carter defaulted. During the critical period with which we are concerned, there was in existence a collective bargaining agreement entered into between an employers' organization, of which Carter was a member, and an employees' organization of which the laborers employed by Carter were members. Pursuant to this agreement Carter was obligated to pay into a "Health and Welfare Fund" the sum of seven and one-half cents per hour for each hour worked by laborers employed by him. Carter paid in full the wage rates required under the terms of the contracts, but did not make the contributions to the Fund as he was obliged to do under the collective bargaining agreement. Following this default Carter became a bankrupt and the trustees of the Fund are here seeking recovery of the delinquent health and welfare contributions from the surety.

The question for decision is whether the surety is liable under its bond for the delinquent health and welfare contributions. Not only is this a question of first impression, but there is a dearth of cases involving analogous questions. Appellants rely upon *Sherman* v. *Achterman* decided by the Appellate Department of the California Superior Court and unreported. As noted by the Court in that case, it was an action upon a bond required by a state statute and is clearly distinguishable from a case involving a Miller Act bond.

The Miller Act, Section 270(a) of Title 40 U.S.C., re-

quires that before any contract exceeding $2,000 for the construction of a public work of the United States is awarded to any person, such person must furnish to the United States a payment bond *for the protection of all persons supplying labor and material* in the prosecution of the work provided for in said contract. Section 270(b) of the Act provides that every person *who has furnished labor or material* in the prosecution of the work and who has not been paid in full therefor shall have the right to sue on such payment bond for the *sum due him.*

[fol. 65] It is at once apparent that recovery on a Miller Act bond is limited to persons who have "furnished labor or material in the prosecution of the work provided for in said contract". There is no contention that these appellants who were plaintiffs below furnished labor or material in the prosecution of the work provided for in said contracts, but they contend that the Miller Act is to be liberally construed and that in so construing it we should disregard the plain requirement of the Act.

The appellants argue that the payments which the contractor agreed to make to them were a part of the consideration and compensation for the labor which was performed on the contracts. It is true that the agreed contributions were *measured by* the amount of labor performed on the projects and it might even be said that the agreement to make the contributions was a part of the consideration for the contract between the contractor and the Union, but that is not the test for recovery here. Recovery can be had on a Miller Act bond only by a "person who has furnished labor or material" and recovery is limited to "sums justly due" such persons. The agreement between the Associated General Contractors and the Union specifically provides that contributions to the Fund shall not constitute or be deemed to be wages due to the employees with respect to whose work such payments are made, and no employee shall be entitled to receive any part of the contributions made or required to be made.

The appellants are not persons who furnished labor or materials and therefor may not maintain an action for recovery on the bond. Even if we were to assume that they were authorized to maintain the action for and on behalf of persons who furnished labor, recovery could not be had

because the delinquent payments sought to be recovered are not "sums justly due" the persons who furnished the labor.

Affirmed.

[File endorsement omitted.]

[fol. 66] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14703

UNITED STATES OF AMERICA for the Benefit and on Behalf of HARRY SHERMAN, etc., Appellant,

vs.

DONALD G. CARTER, Individually; etc., et al., Appellees.

JUDGMENT—Filed and entered January 10, 1956

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the Appellees and against the Appellant.

IT IS FURTHER ORDERED and adjudged by this Court, that the Appellees recover against the Appellant for their costs herein expended and have execution therefor.

[File endorsement omitted.]

[fol. 67] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 68] SUPREME COURT OF THE UNITED STATES,
October Term, 1955

No. 752

UNITED STATES OF AMERICA FOR THE BENEFIT AND ON BEHALF OF HARRY SHERMAN ET AL., PETITIONERS,

vs.

DONALD G. CARTER, INDIVIDUALLY, ETC.

ORDER ALLOWING CERTIORARI—Filed April 30, 1956.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9246-0)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1956

No. ~~252~~ 48

UNITED STATES OF AMERICA for the Benefit and on Behalf of HARRY SHERMAN, CHAS. ROBINSON, RONALD D. WRIGHT, STUART SCOFIELD, LEE LALOR, WILLIAM AMER, ERNEST CLEMENTS, CARL LAWRENCE, GORDON POLLOCK and HAROLD SJOBERG, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California,

Petitioners,

vs.

DONALD G. CARTER, Individually; DONALD G. CARTER, Doing Business as Carter Construction Company, CARTER CONSTRUCTION COMPANY and HARTFORD ACCIDENT AND INDEMNITY CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1955

No.

UNITED STATES OF AMERICA for the Benefit and on Behalf of HARRY SHERMAN, CHAS. ROBINSON, RONALD D. WRIGHT, STUART SCOFIELD, LEE LALOR, WILLIAM AMES, ERNEST CLEMENTS, CARL LAWRENCE, GORDON POLLOCK and HAROLD SJOBERG, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California,

Petitioners,

vs.

DONALD G. CARTER, Individually; DONALD G. CARTER, Doing Business as Carter Construction Company, CARTER CONSTRUCTION COMPANY and HARTFORD ACCIDENT AND INDEMNITY CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of

Appeals for the Ninth Circuit entered in the above-entitled case on January 10, 1956.

OPINIONS BELOW.

The opinion of the District Court, entitled "Order Re Motions for Summary Judgment" (R. 24-26) was not officially reported. The opinion of the United States Court of Appeals for the Ninth Circuit (R. 63-65) has not as yet been officially reported. The latter opinion and the judgment of the Court are printed in Appendix B, *infra*, pp. vi-xi.

JURISDICTION.

The judgment of the United States Court of Appeals was dated January 10, 1956, and was entered on that date (R. 66). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED.

May Petitioners, the trustees of a health and welfare trust fund established by collective bargaining for the benefit of construction laborers, recover payments agreed to be made into the fund with respect to work performed by laborers on federal projects in an action under the Miller Act against the prime contractor and its surety on payment bonds furnished pursuant to that Act?

STATUTE INVOLVED.

The statute involved is the Miller Act, Act of August 24, 1935, c. 642, 49 Stat. 793, 40 U.S.C., Sections 270a-270d. The provisions of this Act are printed in Appendix A, *infra*, pp. i-v.

STATEMENT OF THE CASE.

Petitioners constitute the Board of Trustees of the Laborers Health and Welfare Trust Fund for Northern California (hereinafter referred to as the "Fund") which was established by collective bargaining for the benefit of laborers employed on construction projects in the 46 Northern counties of California.

The collective bargaining agreements which provided for the establishment of the Fund were negotiated by two Chapters of The Associated General Contractors of America, Inc., on behalf of the contractor employers, and the Northern California District Council of Hod Carriers, Building and Construction Laborers of the International Hod Carriers, Building and Common Laborers' Union of America, on behalf of the employees (Admissions, Exh. C, R. 21). The agreements were so-called "Master Labor Agreements" which provided the wage rates and many other terms and conditions governing the employment of construction laborers in the Northern California area (R. 50). On the subject of health and welfare, the agreements provided that commencing on February 1, 1953, each individual employer covered by the

agreements would contribute the sum of seven and one-half cents per hour for each hour worked by employees under the agreements to the Fund (Amended Complaint, par. X, R. 7-8).

The Fund itself was established by a Master Trust Agreement dated March 4, 1953, which was negotiated pursuant to the Master Labor Agreements by the parties to those agreements (Admissions, Exh. C, R. 21). The Trust Agreement provides that the Board of Trustees of the Fund shall have the power to demand and enforce the prompt payment of the contributions agreed to be paid to the Fund (Art. IV, Sec. 3). It likewise provides that the Board shall promptly use the monies available in the Fund to provide the benefits specified in the Health and Welfare Plan (Art. IV, Sec. 4). Pursuant to this directive, the Board has procured insurance policies which have provided substantial benefits for construction laborers and their families, in the form of life insurance, accidental death and dismemberment benefits, hospital expense benefits, surgical expense benefits, X-Ray and laboratory expense benefits, and supplemental accident expense benefits (R. 39-40).

The Trust Agreement provides that no employee or other beneficiary shall have any right or claim to benefits under the Health and Welfare Plan except as provided in the insurance policies procured by the Board of Trustees (Art. VIII, Sec. 2). The agreement also provides that contributions to the Fund shall not "constitute or be deemed to be wages due to the employees with respect to whose work such pay-

ments are made'"[1] and that no employee shall be entitled to receive any part of the contributions made to the Fund in lieu of the benefits provided by the Health and Welfare Plan (Art. II, Sec. 3). In the actual operation of the Health and Welfare Plan, an employee is required to work at least 400 hours in a designated six-month period for one or more contributing employers in order to acquire eligibility for insurance coverage under the Plan for the succeeding six-month period (R. 40). Thus, each hour of work under one of the Master Labor Agreements requires the individual employer to pay seven and one-half cents into the Fund **for the benefit of the employee who actually performs the work,** which results in a credit **to that particular employee's individual account with the Fund** toward eligibility to receive the substantial benefits provided by the Fund for him and his dependents.

Respondent Carter Construction Company was represented in collective bargaining by the Associated Home Builders of Sacramento, which was one of the contractor associations signatory to the Master Labor Agreements and to the Master Trust Agreement (Admissions, Exh. C, p. 21, R. 21). The Company employed construction laborers on two construction projects for the United States Government, and thereafter defaulted in contributions due to the Fund for the months of February, March and April, 1953. Under the terms of the Master Trust Agreement, this

[1]Emphasis is added throughout this petition unless otherwise noted.

default subjected the Company to an additional liability to the Fund for liquidated damages in the amount of $20 for each monthly delinquency and for reasonable attorneys' fees, court costs and other reasonable expenses incurred by the Board of Trustees in connection with the collection of the delinquent payments (Admissions, Exh. C, Art. II, Sec. 8, and Art. IV, Sec. 3, R. 21).

As required by the Miller Act (U.S.C. 40:270a), the Carter Construction Company had provided a payment bond with respect to each of the Government projects. Petitioners brought this action against the Carter Construction Company and against respondent Hartford Accident and Indemnity Co., the surety in its bonds, to recover the delinquent health and welfare contributions, liquidated damages and attorneys' fees. The action was brought in the District Court pursuant to section 2(b) of the Miller Act (App. A, *infra*, p. iii).

Petitioners and respondent surety entered into a stipulation of facts in the District Court (R. 13-21) which was made the basis for a motion and cross-motion for summary judgment (R. 11-12, 23-24). The District Court granted respondent surety's motion for summary judgment (R. 24-27), and petitioners appealed from the resulting judgment (R. 28-29).

The Court of Appeals affirmed the judgment of the District Court, writing a brief opinion which is printed as Appendix B to this petition (*infra*, pp. vi-x). In this opinion the Court first noted that the question before it was one "of first impression";

it then distinguished a case recently decided in favor of petitioners in the State court (*Sherman v. Achterman, infra*, App. C, pp. xii-xxiii)[2] on the ground that the case involved a payment bond required by a State statute; and finally, since it was conceded that petitioners themselves had not actually furnished labor for the bonded projects, it concluded that petitioners could not bring themselves within the letter of the Miller Act.

REASONS FOR GRANTING THE WRIT.

The writ of certiorari sought by this petition should be granted for the reasons (1) that the Court of Appeals decided an important question of federal law which has not been, but should be, settled by the Supreme Court, and (2) that its decision on this question is in conflict with applicable decisions of the Supreme Court.

I.

THE IMPORTANCE OF THE QUESTION INVOLVED.

A. From the standpoint of the protection of the individual laborer.

This court has repeatedly declared that the Miller Act and its predecessor statutes must be liberally construed for the protection of laborers and material-

---

[2]Since the decision in this case is not officially reported and since the decision is directly pertinent to the question presented by this petition, a copy of the decision is appended as Appendix C to the petition.

men (*Guaranty Co. v. Pressed Brick Co.* (1903) 191 U.S. 416, 426; *Hill v. American Surety Co.* (1906) 200 U.S. 197, 203; *Mankin v. Ludowici-Celadon Co.* (1910) 215 U.S. 533, 537; *Title Guaranty & Trust Co. v. Crane Co.* (1910) 219 U.S. 24, 32; *Equitable Surety Co. v. McMillan* (1914) 234 U.S. 448, 455; *A. Bryant Co. v. N. Y. Steam Fitting Co.* (1914) 235 U.S. 327, 337; *Fleischmann Co. v. United States* (1926) 270 U.S. 349, 360; *Standard Ins. Co. v. United States* (1938) 302 U.S. 442, 444; *Fleisher Co. v. United States* (1940) 311 U.S. 15, 17).

In so doing the Court has but carried out the clearly expressed will of Congress. For example, in the discussion which preceded passage of the Miller Act in the Senate, the following transpired (79 Cong. Rec. 13383):

> "Mr. Walsh. Mr. President, I will say to the Senator from Nevada and to the Senator from Nebraska that the investigation conducted by the subcommittee of the Committee on Education and Labor showed a deplorable condition with reference to the way employees on public buildings were defrauded and cheated of their wages, and **any measure that will tend to strengthen their rights and help them to secure their compensation is justified.**
>
> Mr. McCarran. **That is the object of the pending bill,** and I might augment what the Senator from Massachusetts has said as to what has been shown by the hearings to which he has referred.
>
> Mr. Walsh. I did not believe it was possible for men repeatedly to get contracts from the Fed-

eral Government and chisel, the way some of them do, against the wages of the employees."

When the Court of Appeals held that petitioners could not recover in this proceeding because they did not personally furnish labor to the projects involved, the practical effect of such holding was to impose a serious and unwarranted limitation upon the protection provided to construction workmen by the Miller Act.

Until recent years the entire consideration agreed to be paid for labor on construction projects was paid to the individual workmen in the form of hourly or per diem wages. Within the past fifteen years, however, building trades unions have negotiated an increasing number of collective bargaining agreements throughout the country which have required that a portion of this agreed consideration be paid by contractors into welfare funds for the benefit of the workmen. The development along this line has been so marked that in 1954 a subcommittee of Congress reported that welfare plans are "now part and parcel of the entire fabric of wages and working conditions in an employee's 'contract of employment'" (Interim Report on "Welfare and Pension Plan Investigation," January 10, 1954, Subcommittee on Welfare and Pension Funds of Senate Committee on Labor and Public Welfare, 84th Cong., 1st Sess., p. 3).[3]

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[3]The current importance of negotiated welfare funds is unquestioned. In a message to Congress submitted January 11, 1954, the

Negotiated welfare funds had become so important a part of our national economy by 1947 that Congress enacted Section 302 of the Labor Management Relations Act (U.S.C. 29:186), which imposed strict limitations and regulations upon the administration of such funds for the protection of the individual employees. In so legislating, Congress acted upon the basic premise that the payments by employers into such funds were in consideration for the services of the employees and should be expended solely for the benefit of such employees.

The Senate Committee on Labor and Public Welfare reported concerning this provision of the Labor Management Relations Act as follows (S.Rep. No. 105, 80th Cong., 1st Sess., p. 52):

> "An amendment reinserting in the bill a provision regarding so-called welfare funds similar to the section in the Case bill approved by the Senate at the last session [is proposed]. It does not prohibit welfare funds but merely requires

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President said (100 Cong. Rec. 111; U. S. Code Cong. & Adm. News, 1954, p. 1533):

> "It is my recommendation that Congress initiate a thorough study of welfare and pension funds covered by collective-bargaining agreements, with a view of enacting such legislation as will protect and conserve these funds for the millions of working men and women who are the beneficiaries."

See, also, the President's Message on the State of the Union, January 5, 1956, 102 Cong. Rec. 136, U. S. Code Cong. & Adm. News, 1956, p. 49.

Subsequent to the Interim Report cited in the text, the Subcommittee on Welfare and Pension Funds of the Senate Committee on Labor and Public Welfare submitted a further interim report dated July 20, 1955, and its study is continuing. The Committee on Education and Labor of the House of Representatives has also been studying negotiated welfare and pension funds pursuant to H. Res. 115, 83d Congress, 1st Session.

that, if agreed upon, such funds be jointly administered—**be, in fact, trust funds for the employees, with definite benefits specified, to which employees are clearly entitled, and to obtain which they have a clear legal remedy.** The amendment proceeds on the theory that union leaders should not be permitted, without reference to the employees, to divert funds paid by the company, **in consideration of the services of employees,** to the union treasury or the union officers, except under the process of strict accountability."

". . . It seemed essential to the Senate at that time, and today, that if any such huge sums were to be paid, representing as they do the value of the services of the union members, **which could otherwise be paid to the union members in wages,** the use of such funds be strictly safeguarded."

The importance and value of the portion of a construction laborer's compensation which is now represented by employer contributions to welfare funds is well illustrated by the benefits provided by the Fund administered by petitioners. These benefits consist of $2000 life insurance on the laborer, plus accidental death and dismemberment insurance in the amount of an additional $2000; life insurance on dependents ranging from $100 to $1000 depending upon age; and hospital and surgical benefits for the non-occupational injury or illness of the laborer and his dependents, consisting of full reimbursement for the cost of ward service in a hospital for a maximum of 70 days, reimbursement for special hospital charges in full up to $400 plus 75% of charges over $400, surgical ex-

pense benefits under a $300 surgical schedule, reimbursement for doctor's home, office and in-hospital calls, X-ray and laboratory expense reimbursement up to $50 and supplemental accident expense payments up to $300.

The money which a federal works contractor pays into petitioners' welfare fund with respect to each hour of work of an individual laborer on a federal project gives that specific laborer a credit toward eligibility for the substantial benefits described above. If the laborer accumulates credit for 400 or more hours of work during a stated six-months period, he and his dependents then become eligible for benefits from the fund for the succeeding six-months period.

The decision of the Court of Appeals has denied to this laborer the security of the contractor's payment bond for these payments. If the money is not paid, it is the laborer, not the petitioners, who suffers the loss. Petitioners have the right to sue, but in suing they act as trustees for the laborer and for his benefit. **Consequently, when the Court of Appeals held that a Miller Act bond furnishes no protection to petitioners, what it also held was that the Act gives no protection to the laborer for the substantial and important portion of the consideration for his labor which the contractor agreed to pay into the Fund.**

B. From the standpoint of the United States Government.

The question involved in this proceeding is also important from the standpoint of the United States Government.

The purpose of the Miller Act is not only to protect laborers and materialmen against loss but also to protect federal projects from the delays which would inevitably result if suppliers of labor and material were relegated to other means for the enforcement of their just demands (*Standard Ins. Co. v. United States* (1938) 302 U.S. 442; *City of Stuart v. American Surety Co.* (5th C.C.A. 1930) 38 F. (2d) 193, 195).

Since it has been stipulated that the agreement to make health and welfare contributions was part of the consideration for the services of the laborers who worked on the bonded projects (R. 7-9, 13), a breach of that agreement would clearly entitle the laborers to withdraw their services and their union to exercise its economic power of striking and picketing to remedy the default (*Sherman v. Achterman, infra,* App. C., p. xv; *Dunbar Co. v. Painters & Glaziers District Council No. 51* (D. C. D. of C. 1955) 27 CCH Labor Cases, para. 68,921, p. 88,093). **The holding, therefore, that building tradesmen are not entitled to the protection of a Miller Act bond insofar as payments to welfare funds are concerned leaves every federal project in the vast areas in which such funds are now established vulnerable to interruption and delay if the contractor becomes delinquent in his payments.**

II.

THE QUESTION SHOULD BE SETTLED BY THE SUPREME COURT BECAUSE CONSTRUCTION OF THE LITERAL WORDS OF THE MILLER ACT TO EFFECTUATE THE CLEAR OBJECTIVES OF THE ACT REQUIRES "A DEGREE OF IMPLICATION" WHICH CAN BEST BE MEASURED BY THIS COURT.

The court below made no effort to interpret the provisions of the Miller Act in the light of the legislative history of the Act and the beneficent purposes the Act was intended to serve. It dismissed the case of *Sherman v. Achterman* (*infra,* App. C, pp. xii-xxiii), the only direct precedent cited by either side, as "clearly distinguishable" because the case involved a State Act bond rather than a Miller Act bond, without attempting to reconcile the fact that the objectives of the State Act and the Miller Act are identical. Its decision was grounded solely and squarely upon the fact that, if the Miller Act is read and applied literally, "recovery on a Miller Act bond is limited to persons who have 'furnished labor or material in the prosecution of the work provided for in said contract' " (App. B, *infra,* p. viii). Petitioners did not wield picks or push wheelbarrows on the bonded projects; ergo, they are not entitled to sue under the Miller Act.

This approach to the interpretation of the Miller Act is in direct conflict with the approach this Court has taken to similar problems arising under the Act and its predecessor statutes. (See authorities cited *supra,* p. 8). Understandably, therefore, the interpretation itself is in conflict with the decisions of this Court which are most applicable to the basic question involved.

The literal terms of the Miller Act, and its predecessor statutes, have always presented a difficult problem of interpretation from the standpoint of effectuating the objectives of Congress.

In *Hill v. American Surety Co.* (1906) 200 U.S. 197, this court had before it the question whether a statute which required a contractor's bond conditioned "that such *contractor or contractors* shall promptly make payments to all persons supplying *him or them* labor or materials in the prosecution of the work provided for in such contract" (200 U.S. 201), gave protection to a claimant who had furnished services and materials to a subcontractor. It is apparent from the words we have italicized that if this Court had followed the approach adopted by the court below in this case, it would have answered the question in the negative. Instead, it answered in the affirmative, saying (p. 203):

> "But we must not overlook, in construing this obligation, the manifest purpose of the statute to require that material and labor actually contributed to the construction of the public building shall be paid for and to provide a security to that end.
>
> Statutes are not to be so literally construed as to defeat the purpose of the legislature. 'A thing which is within the intention of the makers of the statute, is as much within the statute, as if it were within the letter.' *United States v. Freeman*, 3 How. 556. **'The spirit as well as the letter of a statute must be respected, and where the whole context of a law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called**

in to aid that intent.' Chief Justice Marshall in *Durousseau v. United States*, 6 Cranch, 307."

In all of the decisions which have succeeded the *Hill* case, this Court has consistently heeded the admonition of that case concerning respect for the spirit of the statute and the intent of its makers. The considerations stated in the *Hill* case were reiterated in *Title Guaranty & Trust Co. v. Crane Co.* (1910) 219 U.S. 24, 32 (holding that a wooden steamer was a "public work" within the meaning of the statute), in *A. Bryant Co. v. N. Y. Steam Fitting Co.* (1914) 235 U.S. 327, 337, and *Fleischmann Co. v. United States* (1926) 270 U.S. 349, 360 (construing and reconciling the ambiguous time limitations of the Heard Act), in *Standard Ins. Co. v. United States* (1938) 302 U.S. 442, 444 (holding that a railroad which transports material for a public structure furnishes "labor" within the meaning of the statute) and in *Fleisher Co. v. United States* (1940) 311 U.S. 15, 17 (holding that the provisions of the Miller Act specifying the method of serving notice on the prime contractor are directory only).

The court below acknowledged that the case before it was one of "first impression" (App. B, *infra*, p. viii), but it gave no consideration whatever to the pertinency of the *Hill* case and the many other applicable decisions of this Court to the solution of the question presented to it. It is not surprising, therefore, that the court's conclusion that "recovery on a Miller Act bond is limited to persons who have 'furnished labor or material in the prosecution of the work provided in

said contract' " (App. B, *infra*, p. viii) is in direct conflict with decisions of this Court.

In *Title Guaranty & Trust Co. v. Crane Co.* (1910) 219 U.S. 24, this court held that an assignee of the persons who furnished labor and materials to a project can sue on the bond. Speaking tersely and to the point, it said (p. 35):

> "The assignment of some of the claims did not affect the remedy. *United States v. Rundle*, 100 Fed. Rep. 400."

In the *Rundle* case the court explained its holding as follows (100 Fed. 403):

> "The general rule is that an assignment of a debt carries with it the security. The application of this general principle to such cases as the present accords with the obvious purpose of the statute, while the limited construction contended for by the defendants in error might very well deprive those for whom the security was intended from realizing on their claims by assignment."

To the same effect, see:

U. S. Fidelity Co. v. Bartlett (1913) 231 U. S. 237;

Bartlett & Kling v. Dings (8th C.C.A. 1918) 249 Fed. 322, 325;

United States v. Brent (W.D.S.C. 1916) 236 Fed. 771, 777.

The court below summarized its holding as follows (App. B, *infra*, pp. ix-x):

> "The appellants [petitioners] are not persons who furnished labor or materials and therefor

> may not maintain an action for recovery on the bond. Even if we were to assume that they were authorized to maintain the action for and on behalf of persons who furnished labor, recovery could not be had because the delinquent payments sought to be recovered are not 'sums justly due' the persons who furnished the labor."

Assignees of laborers and materialmen are not "persons who furnished labor or materials" and yet this Court has held that they may maintain actions for recovery on Miller Act bonds. Where an assignment of labor claims has been made, the sums claimed are no longer "justly due" to the persons who furnished the labor, yet under the decisions of this Court, such fact has not barred the assignee from a recovery.

The decision of the court below in this case demonstrates that the literal terms of the Miller Act require a "degree of implication" in order to effectuate the clear intent of Congress to protect the laborer and to guard public projects against delay. Obviously, this Court, which speaks with finality on the subject, is in the best position to call in and measure accurately this degree of implication in aid of the Congressional intent. The rules heretofore established by this Court for the interpretation of the Miller Act were not applied below in the decision of this important question of first impression, and hence this Court should grant certiorari to resolve the conflict with its prior decisions.

III.

THE DECISION BELOW IS ERRONEOUS SINCE THE RIGHT OF RECOVERY ON A MILLER ACT BOND IS NOT LIMITED TO PERSONS WHO HAVE ACTUALLY FURNISHED LABOR OR MATERIALS IN THE PROSECUTION OF THE WORK. ASSIGNEES OF SUCH PERSONS ARE ENTITLED TO SUE ON THE BOND AND PETITIONERS HAVE THE SAME STANDING IN THIS REGARD AS ASSIGNEES.

As we have shown (*supra*, p. 17) this Court has held directly that assignees of laborers and materialmen are entitled to sue on Miller Act bonds.

In the only direct precedent in this relatively new and as yet uncharted field of the law, a referee in bankruptcy sitting in California ruled that under California law the trustees of a fund similar to that administered by petitioners were assignees of the employee beneficiaries of the fund by virtue of an equitable assignment (*Matter of Schmidt* (S.D. Calif. 1953) 24 CCH Labor Cases, par. 68,012). This decision is unquestionably sound under the California law since under that law, as declared in the leading case of *McIntyre v. Hauser* (1900) 131 Cal. 11, at p. 14:

> "In order to constitute an equitable assignment of a debt, no express words to that effect are necessary. If from the entire transaction it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment will be held to have taken place."

To the same effect, see:

Goldman v. Murray (1912) 164 Cal. 419, 422.

It clearly appears from the entire transaction whereby the Fund administered by petitioners was

established that the construction laborers who are the beneficiaries of the Fund have assigned to petitioners all of their rights in the portion of the consideration for their services which their employers have agreed to pay into the Fund. By the terms of the Trust Agreement the laborers are divested of any right to receive any part of the contributions to the Fund (R. 21, Ex. C, Art. II, Sec. 3) and petitioners are expressly given the right and authority to enforce the prompt payment of such contributions (R. 21, Exh. C, Art. IV, Sec. 3). As the collective bargaining representative of the laborers, the Northern California District Council of Hod Carriers, Building and Construction Laborers had the authority to make this bargain on their behalf (*Potlatch Forests v. International Woodworkers* (D. Ida. 1951) 108 F. Supp. 906, *aff'd* (9th C.C.A. 1953), 200 F. (2d) 700; *Coos Bay Lumber Company v. Local 7-116, International Woodworkers of America* (CIO) (Ore. 1955) 279 Pac. (2d) 508, 512, *reh'g den.*, 280 Pac. (2d) 412; *cf. National Labor Relations Board v. W. W. Cross & Co.* (1st C.C.A. 1949) 174 F. (2d) 875), and they are bound by the bargain. Accordingly, title to this portion of the consideration for the laborers' services is vested in petitioners and the essential element of an equitable assignment under California law is established.

In this connection, the very provisions of the Trust Agreement (R. 21) which make clear that the employees have transferred all of their interest in the health and welfare contributions to petitioners as trustees for their benefit—namely, the provisions that

"contributions to the Fund shall not constitute or be deemed to be wages due to the employees with respect to whose work such payments are made, and no employee shall be entitled to receive any part of the contributions made or required to be made"—were cited by the court below in support of its conclusion that petitioners could not bring themselves within the terms of the Miller Act (App. B, p. ix). The decisions of this Court with regard to assignees were brought to the attention of the court below by counsel, and the argument here made was presented to that court, but it saw fit to ignore both in its opinion. The decision below cannot be reconciled with the decisions of this Court concerning assignees and the resulting conflict presents clear ground for granting certiorari.

Further, the consideration which led this Court to recognize the right of assignees to sue on a Miller Act bond argues even more persuasively for a similar recognition of the right of trustees such as petitioners to sue on the bond.

The *Rundle* case makes clear that the purpose of recognizing assignees as proper parties plaintiff is to enable laborers and materialmen to realize on their claims by assignment (*supra*, p. 17). When a laborer assigns his claim against a defaulting contractor he frequently does so at a discount, and when the assignee sues for the full amount of the claim, he acts in part for his personal benefit. Petitioners as trustees, on the other hand, are suing for the sole benefit of the laborers and whatever they recover will enure in its entirety to the benefit of such laborers. They are more

truly representative of the laborers who actually performed services on the bonded projects than assignees would be, and their right to sue in their own names for the benefit of such laborers is clear under the decisions of this Court (*Stone v. White* (1937) 301 U.S. 532, 536; *Kerrison, Assignee v. Stewart* (1876) 93 U.S. 155, 160), under the Federal Rules of Civil Procedure (Rule 17(a)) and under the statutory and decisional law of California (California Code of Civil Procedure, section 369; *Thorpe v. Story* (1937) 10 Cal. (2d) 104, 114; *City of Oakland v. California Construction Co.* (1940) 15 Cal. (2d) 573, 578; *City of Oakland v. De Guarda* (1928) 95 Cal. App. 270, 285).[4]

CONCLUSION.

For the foregoing reasons, we submit that if the approach to the interpretation of the Miller Act marked out by this Court is followed, no difficulty is encountered in bringing petitioners within the purview of that Act. The court below did not follow this approach and as a consequence it fell into error.

The question presented herein is clear-cut, the record is short and uncomplicated and the matter is one of major and current significance. The rights of the laborers represented by petitioners compare favorably

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[4]The parties considered petitioners' right to sue so clear that such right was conceded by respondent surety in the District Court. Counsel for respondent there said (R. 33): [We] are not making any issue as to their [petitioners'] right to bring this action . . . We are not interested in raising any question of right to sue, capacity or any such matters."

in importance with those of boarding house keepers involved in *Brogan v. National Surety Co.* (1918) 246 U.S. 257, and those of railroads involved in *Standard Insurance Co. v. United States* (1938) 302 U.S. 442, and they are entitled to the same thorough and judicious consideration as was accorded to the latter by this Court. This, we respectfully submit, they have not yet received, and accordingly this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
March 7, 1956.

GARDINER JOHNSON,
CHARLES P. SCULLY,
Counsel for Petitioners.

JOHNSON & STANTON,
THOMAS E. STANTON, JR.,
Of Counsel.

(Appendices A, B and C Follow.)

Appendix A

The provisions of the Miller Act (Act of August 24, 1935, c. 642, 74th Cong., 1st Sess., 49 Stat. 793, 40 U.S.C., Secs. 270a-270e) are as follows:

AN ACT requiring contracts for the construction, alteration, and repair of any public building or public work of the United States to be accompanied by a performance bond protecting the United States and by an additional bond for the protection of persons furnishing material and labor for the construction, alteration, or repair of said public buildings or public work.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress Assembled.

Section 1. (a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all

persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

Section 2. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expira-

tion of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District

Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit.

Section 3. The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents, execution, and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof.

Section 4. The term "person" and the masculine pronoun as used throughout this Act shall include all persons whether individuals, associations, copartnerships, or corporations.

Section 5. This Act shall take effect upon the expiration of sixty days after the date of its enactment, but shall not apply to any contract awarded pursuant to any invitation for bids issued on or before

the date it takes effect, or to any persons or bonds in respect of any such contract. The Act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works," approved August 13, 1894, as amended, is repealed, except that such Act shall remain in force with respect to contracts for which invitations for bids have been issued on or before the date this Act takes effect, and to persons or bonds in respect of such contracts.

Appendix B

United States Court of Appeals for the Ninth Circuit

United States of America for the Benefit and on Behalf of Harry Sherman, Chas. Robinson, Ronald D. Wright, Stuart Scofield, Lee Lalor, William Ames, Ernest Clements, Carl Lawrence, Gordon Pollock and Harold Sjoberg, as Trustees of the Laborers Health and and Welfare Trust Fund for Northern California,

Appellants,

vs.

Donald G. Carter, Individually; Donald G. Carter, Doing Business as Carter Construction Company; Carter Construction Company and Hartford Accident and Indemnity Co.,

Appellees.

No. 14,703
Jan. 10, 1956

Appeal from the United States District Court for the Northern District of California, Southern Division

Before: HEALY and LEMMON, Circuit Judges, and BYRNE, District Judge.

BYRNE, District Judge

Appellants filed suit on a bond furnished by Carter, as contractor, and executed by Hartford Accident and

Indemnity Company, as surety, pursuant to the provisions of the Miller Act (40 U. S. C. 270(a) et seq.) to recover health and welfare contributions alleged to be due on account of labor performed on public work of the United States. The District Court granted Hartford's motion for summary judgment and this appeal followed.

The material facts which are not in dispute may be summarized as follows: Carter as general contractor entered into two written contracts with the United States of America for the construction of certain buildings at Travis Air Force Base and Mather Field in California. Under the terms of the contracts Carter was required to furnish the materials and pay the labor at wage rates set forth in the specifications which were a part of the contracts. Under the terms of the bond Hartford was obliged to make these payments in the event Carter defaulted. During the critical period with which we are concerned, there was in existence a collective bargaining agreement entered into between an employers' organization, of which Carter was a member, and an employees' organization of which the laborers employed by Carter were members. Pursuant to this agreement Carter was obligated to pay into a "Health and Welfare Fund" the sum of seven and one-half cents per hour for each hour worked by laborers employed by him. Carter paid in full the wage rates required under the terms of the contracts, but did not make the contributions to the Fund as he was obliged to do under the collective bargaining agreement. Following this default Carter be-

came a bankrupt and the trustees of the Fund are here seeking recovery of the delinquent health and welfare contributions from the surety.

The question for decision is whether the surety is liable under its bond for the delinquent health and welfare contributions. Not only is this a question of first impression, but there is a dearth of cases involving analogous questions. Appellants rely upon *Sherman v. Achterman* decided by the Appellate Department of the California Superior Court and unreported. As noted by the Court in that case, it was an action upon a bond required by a state statute and is clearly distinguishable from a case involving a Miller Act bond.

The Miller Act, Section 270(a) of Title 40 U.S.C., requires that before any contract exceeding $2,000 for the construction of a public work of the United States is awarded to any person, such person must furnish to the United States a payment bond *for the protection of all persons supplying labor and material* in the prosecution of the work provided for in said contract. Section 270(b) of the Act provides that every person *who has furnished labor or material* in the prosecution of the work and who has not been paid in full therefor shall have the right to sue on such payment bond for the *sum due him.*

It is at once apparent that recovery on a Miller Act bond is limited to persons who have "furnished labor or material in the prosecution of the work provided for in said contract". There is no contention

that these appellants who were plaintiffs below furnished labor or material in the prosecution of the work provided for in said contracts, but they contend that the Miller Act is to be liberally construed and that in so construing it we should disregard the plain requirement of the Act.

The appellants argue that the payments which the contractor agreed to make to them were a part of the consideration and compensation for the labor which was performed on the contracts. It is true that the agreed contributions were *measured by the* amount of labor performed on the projects and it might even be said that the agreement to make the contributions was a part of the consideration for the contract between the contractor and the Union, but that is not the test for recovery here. Recovery can be had on a Miller Act bond only by a "person who has furnished labor or material" and recovery is limited to "sums justly due" such persons. The agreement between the Associated General Contractors and the Union specifically provides that contributions to the Fund shall not constitute or be deemed to be wages due to the employees with respect to whose work such payments are made, and no employee shall be entitled to receive any part of the contributions made or required to be made.

The appellants are not persons who furnished labor or materials and therefore may not maintain an action for recovery on the bond. Even if we were to assume that they were authorized to maintain the action for and on behalf of persons who furnished labor, recovery could not be had because the delinquent payments

sought to be recovered are not "sums justly due" the persons who furnished the labor.

AFFIRMED.

(Endorsed:) Opinion. Filed Jan. 10, 1956.
Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

United States of America for the Benefit and on Behalf of Harry Sherman, etc., Appellant, vs. Donald G. Carter, Individually; etc., et al., Appellees.	No. 14,703

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the Appellees and against the Appellant.

It is further ordered and adjudged by this Court, that the Appellees recover against the Appellant for their costs herein expended and have execution therefor.

(Endorsed) Judgment
Filed and Entered: January 10, 1956
Paul P. O'Brien, Clerk

Appendix C.

FILED
MAY 18, 1955
MARTIN MONGAN, Clerk
By J. F. Witman
Deputy Clerk

In the Superior Court of the State of California,
in and for the City and County of San Francisco

APPELLATE DEPARTMENT

Harry Sherman, et al., Plaintiffs and Appellants, vs. Leonard Achterman, et al., Defendants and Respondents.	Appeal No. 2368
J. F. Cambiano, et al., Plaintiffs and Appellants, vs. Leonard Achterman, et al., Defendants and Respondents.	Appeal No. 2370

MEMORANDUM OPINION

These appeals present a question new to the courts of this state. The facts are undisputed, the appeals being based on judgments upon orders sustaining demurrers without leave to amend, and are set forth in

the next paragraph as they have been copied from the opinion of the learned judge who rendered the judgments.

This is an action against a firm of contractors and the insurance company furnishing the construction bond, for alleged default in payment of wages due laborers.

The complaint, by appropriate allegations, sets forth the execution, by the contractors, of two building contracts. The complaint further recites that a written Trust Agreement was entered into between the contractors, as members of an Employers' Association, and the Union representing certain employees on the job in question, whereby the contractors would contribute and pay into a Health and Welfare Fund, established by said above-mentioned contract, the sum of 7½ cents per hour for each hour worked by laborers in its employ on said jobs.

The contractor defaulted in making the required payments into the Fund for workmen on the two jobs bonded, and plaintiffs, as Trustees of the Health and Welfare Fund above mentioned, seek recovery on the bond. By general demurrer, the defendant insurance company questions the sufficiency of facts to constitute a cause of action, and also the legal capacity of the plaintiffs to sue.

The trial judge sets forth the test upon which the decision was made, as follows: "If the payments are part of wages due the laborers, the sums are within the provisions of the bond. If they are not such payments, no cause of action is stated."

However, the statute does not refer to wages, but requires that the bond provide that the surety will pay, when the contractor fails "to pay for any materials, provisions, provender or other supplies, or teams used in, upon, for or about the performance of the work contracted to be done, *or for any work or labor thereon of any kind. . . .*"

There may be, and these days there often are, payments for work or labor which are not wages. Measured by the test of "wages" plaintiff would have some difficulty at once, because the Trust Agreement expressly provides that the contribution to the Fund shall not "constitute or be deemed to be wages due to the employees with respect to whose work such payments are made." Whether this clause would prevent plaintiffs from showing that, in a broad sense, the payments are "wages", we need not decide. They are payments for labor.

We believe that the statute, and, therefore, the bonds (which, under well known provisions of the law of suretyship, must be coequal with the requirements of the statute (*Los Angeles Stone Co. v. National Surety Co.*, 178 Cal. 247)) cover the payments required under the Trust Agreement.

Viewed from the standpoint of the employer, what else are these but payments for the performance of work? Why, except to purchase labor, did the employer agree to make the payments? Viewed from the employees' aspect, the payments must be regarded as payments for labor, too. The employees had a vital interest in having these payments made, because to the extent there was failure, the Fund would be diminished.

The Fund is not something which can be made up from other sources, including stockholders' equities in capital and surplus, such as are the resources of privately owned insurance carriers, which may supply workmen's compensation insurance. It is a pool created by collective bargaining, and it has the character of a reward for labor. If the employer were to announce, at the commencement of a public job, that he would not make the payments called for by the collective bargaining agreement, no doubt the labor unions would not supply the workers, and they would be perfectly within their rights. A payment "for labor" would have been defaulted.

It does not seem important to us that the *benefits* from the Fund were not allocable to the particular job; the payments *into* the Fund were so allocable, and the default reduced the Fund pro tanto.

Finally, from the standpoint of the public interest, these payments would seem to be "for labor". As appellant points out, the union could strike when these payments were not made, thus delaying public improvements. This is not by any means, as respondent intimates in its brief (p. 2) a "threat of labor delays and strikes if this Court's decision is not in favor of appellant." It is simply a statement that if an employer fails to pay what admittedly he should pay, and his surety does not have to make up his principal's deficiency, there could be a strike (though there was none in this case), and that the public has an interest in preventing such interruption of public work, brought about by the employer's default.

Since the judgment by the trial court, the Supreme Court of Oregon has decided a case which considers

the nature of agreements for group insurance of employees. The case is that of *Coos Bay Lumber Company v. Local 7-116, International Woodworkers of America,* 279 Pac.2d 508; 60 Ore. Adv. Sheets 67. The Court there held that a group insurance program is primarily for the benefit of the members of the union, and is the subject of collective bargaining as covered by the National Labor Relations Act, and that individual employees who do not wish to participate must, nevertheless, be subject to the agreement made by their union. Thus, the subject has been taken away from the employees, individually. The Court held that there is no real difference between an "employee-paid" plan where the 7½¢ is actually deducted from the worker's wage, and an "employer-paid" plan where the amount agreed upon in the collective bargaining agreement is paid directly by the employer to the trustees. The court says (60 Ore. Adv. Sheets, at p. 76):

> "Since such plans are mandatory subjects for collective bargaining, a union has authority to obtain a wage increase for its members in the form of an employer-paid insurance plan. It follows, therefore, that it also has the power to obtain a wage increase to be applied for the purchase of insurance as the union directs."

We are aware that in the *Coos Bay* case the 7½¢ was referred to as a wage increase, and that in the present case the required payments were stated *not* to be wages (no doubt to avoid the very difficulty that arose in the *Coos Bay* case, where some of the indi-

vidual employees wished the sums paid to them, not to the Fund), but the result was the same; in neither case did the employee actually receive the amounts into his pocket, whether they were called wages or not. The case is important because it shows there is no real distinction between employer-paid and employee-paid plans, a distinction which the trial court made in the present case. (opinion, p. 4.)

We examine now the authorities cited; first those given by respondent.

The first is, *City of Portland ex rel. National Hospital Association,* 9 Pac. 2d 115, which was cited in the Court's memorandum as well. In that case, the contractor had agreed with the City of Portland, in connection with public work done for the city, that he would "fully secure and pay just claims, if any there be, of all persons furnishing labor or material under said contract." The contractor agreed with the hospital association to pay a certain amount for each employee (and the contractor deducted that amount from the wages, although the contract with the hospital association was silent on this) in return for health coverage. When the contractor defaulted, the association sought to obtain payment of its fees from the surety.

It was held that the surety was not liable. The Supreme Court held that under its contract the association was not concerned with the source of its fees, for it could look to the contractor for them whether or not he deducted them from the employees' wages. The employee owed the association nothing, and "here-

fore could not have been deemed to have assigned anything to the association. Thus, there was no one before the Court who came within the category set forth in the statute, namely, "all persons furnishing labor" etc.

We believe the *City of Portland* case is to be distinguished from the one before us on at least three grounds. In the first place, the Oregon statute refers to the *persons* to whom claims shall be paid, that is, "persons furnishing labor"; but the California statute refers to the *subject matter* for which the contractor has defaulted, that is, his failure "to pay . . . . for any work or labor."

In the second place in the Oregon case it was a matter more or less of indifference to the laborer whether or not the health association was paid, because he was entitled to benefits anyway. This feature also distinguishes our holding in *California Western States Life Ins. Co. v. U.S.F. & G. Co.*, Civil Appeal No. 2189, wherein we held that the Unemployment Disability carrier's premium is not covered by the surety bond of a public works contractor. This is because it does not concern the employee, who has no substantial interest whether the premium is paid or not. The same holds true of the cases of compensation carrier premiums.

Finally, the *City of Portland* case was decided in 1932, before the time of the National Labor Relations Act, which makes such plans for health insurance the subject of collective bargaining on behalf of all the employees. (*Coos Bay* case, supra.)

Also, we believe distinguishable are the several cases in which it has been held that income taxes withheld by the employer are not within the provisions of labor and material bonds. The laborer has no interest (above that of any citizen) in the payment to the government of his withheld taxes. His taxes are deemed paid even if the contractor fails to remit to the government, and he gets whatever refund he may be entitled to, though the employer has defaulted.

Likewise, it has been stated that the government has ample power to protect itself in order to collect taxes. (*Gen. Casualty Co. v. United States,* 205 Fed. 2d 753, 755.) The United States need not appear as standing in the shoes of an unpaid workingman.

The case of *United States ex rel. Sherman v. Carter,* 33521, decided by the U. S. District Court on January 21, 1955 (and now on appeal), is cited by respondents. The contract, under collective bargaining, for payment of employee health and welfare contributions, is the same as the one before us. The Court held that such payments are not recoverable from the defunct contractor's surety under the Miller Act. (Title 40 USCA 270a et seq.) However, apart from the fact that the judgment has been appealed, and in any case is not controlling upon us, we find it is to be distinguished from California cases in two respects: First, the Miller Act, in Section 270b of the United States Code, reads:

> "Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment

> bond is furnished under section 270a of this title and who has not been paid in full"

may recover from the surety. Thus, as in the *City of Portland* case statute, the statute refers to the *person* who may collect, rather than to the *subject matter,* as does the California statute. This is by no means a too-refined distinction, because the Court pointed out in the *Carter* case, supra, that the *laborers* had been paid in full. In a sense, perhaps, they had been so paid; but, considering that there were no payments coming to *them,* or to trustees for them, it does not follow that there were no payments due *for labor,* as the California statute states it.

In the second place, the Miller Act evidently is to protect "those supplying labor and materials on government jobs substantially in the same way as they are protected under state mechanics' lien laws." (*Carter* case, pp. 1 and 2; *United States v. Harman,* 192 Fed. 2d 999.)

Considering, finally, the reasoning of the Court in the *Carter* case to the effect that the benefits are not allocable to the employees on the specific job, but are reserved for employees on any job who have worked 400 hours in a six-month period, we think that it is not of importance, at least so far as the California statute is concerned. The test is that set forth in the statute. If the payments are for labor, they are covered by the surety bond.

It is argued by respondents that the fact that section 2404 of the Government Code was amended to

include within its provisions payments due under the Unemployment Insurance Act is proof that other "fringe" benefits are not so included. But we think the legislature, when courts decided that the unemployment payments were not covered, simply made haste to cover them; we do not think the legislature would have those payments included and these excluded.

These cases presently before us are, as stated at the outset, the first ones before the courts. It seems to us that when the contractor and the union agreed upon payments by the former of the welfare funds, it was an agreed payment "for labor"; that the surety company could ascertain that these payments were to be made and could base its premium rates accordingly, just as this contractor must have included them in his estimate of the cost of the job. They were ascertainable as much as were outright wages.

The judgments based on the orders sustaining the demurrers without leave to amend are reversed.

Dated, May 18th, 1955.

/s/ Preston Devine
Presiding Judge.

I concur:

/s/ Edward Molkenbuhr
Judge.

I dissent. I agree with the opinion of Judge Caulfield of the Municipal Court.

/s/ Daniel R. Schoemaker
Judge.

In the Superior Court of the State of California,
in and for the City and County of San Francisco

APPELLATE DEPARTMENT

Harry Sherman, et al., Plaintiffs and Appellants, vs. Leonard Achterman, et al., Defendants and Respondents.	Appeal No. 2368
J. F. Cambiano, et al., Plaintiffs and Appellants, vs. Leonard Achterman, et al., Defendants and Respondents.	Appeal No. 2370

MEMORANDUM OPINION ON PETITION FOR REHEARING

On Petition for Rehearing it is urged that plaintiffs have no right to bring the action because: (a) they are not parties to the bond; and, (b) the cause of action is created by Section 4205 of the Government Code, not Section 4204 of that Code.

Although this argument was not stressed at the hearing before us and was not convincing to the trial court, nevertheless we have given it full consideration. We did not decide the case on the inability of counsel to answer a question put to him on oral argument.

We believe that although plaintiffs are not parties to the bond they may maintain the action as trustees.

The United States Labor Relations Act contemplates that there may be such a trusteeship. (18 U.S.C. Sec. 186, Sub. Div. 5.) Section 369 C.C.P. allows trustees to sue. We think it likely that there was at least an equitable assignment to the trustees. In re Schmidt, 24 Labor Cases (CCH) #68012). If the facts of the case do not sustain this proposition, it will be remembered that we are deciding upon judgment after sustaining of a demurrer without leave to amend.

We believe, too, that Sections 4204 and 4205 of the Government Code are cumulative, that the bond must comply with both, and that it is not necessary that one be entitled to the benefits of mechanics' lien laws in order to be protected under the public works surety acts. It has been held that the latter acts are broader in scope (*A. L. Young Mch. Co. v. Cupps*, 213 Cal. 210 and cases cited therein), and that, procedurally, one may sue on a contractor's bond without resorting to the Mechanics Lien Statutes. (*Sunset Lumber Co. v. Smith*, 95 Cal. App. 307.) If Section 4205 of the Government Code were the only one "creating" rights against the surety, what is the purpose of Section 4204? We do not believe it is merely a prelude to 4205.

The petition for rehearing is denied.

Dated, June 17, 1955.

/s/ Preston Devine
Presiding Judge.

I concur:

/s/ Edward Molkenbuhr
Judge.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 48

UNITED STATES OF AMERICA for the Benefit and on Behalf of HARRY SHERMAN, CHAS. ROBINSON, RONALD D. WRIGHT, STUART SCOFIELD, LEE LAILOR, WILLIAM AMES, ERNEST CLEMENTS, CARL LAWRENCE, GORDON POLLOCK and HAROLD SJOBERG, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California,
Petitioners,

vs.

DONALD G. CARTER, Individually; DONALD G. CARTER, Doing Business as Carter Construction Company, CARTER CONSTRUCTION COMPANY and HARTFORD ACCIDENT AND INDEMNITY CO.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

OPENING BRIEF OF PETITIONERS.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 48

UNITED STATES OF AMERICA for the Benefit and on Behalf of HARRY SHERMAN, CHAS. ROBINSON, RONALD D. WRIGHT, STUART SCOFIELD, LEE LALOR, WILLIAM AMES, ERNEST CLEMENTS, CARL LAWRENCE, GORDON POLLOCK and HAROLD SJOBERG, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California,
Petitioners,

vs.

DONALD G. CARTER, Individually; DONALD G. CARTER, Doing Business as Carter Construction Company, CARTER CONSTRUCTION COMPANY and HARTFORD ACCIDENT AND INDEMNITY CO.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

OPENING BRIEF OF PETITIONERS.

OPINIONS BELOW.

The opinion of the District Court, entitled "Order re Motions for Summary Judgment" (R. 24-26), was

not officially reported. The opinion of the United States Court of Appeals for the Ninth Circuit (R. 63-65) is reported at 229 F. (2d) 645.

JURISDICTION.

The judgment of the United States Court of Appeals was dated January 10, 1956, and was entered on that date (R. 66). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1). The writ of certiorari herein was applied for on March 12, 1956, which was within ninety days after the entry of the judgment, as required by 28 U.S.C., Section 2101(c).

STATUTE INVOLVED.

The statute involved is the Miller Act, Act of August 24, 1935, c. 642, 49 Stat. 793, 40 U.S.C., Sections 270a-270d. The provisions of this Act are printed in Appendix A, *infra*, pp. i-v.

QUESTIONS PRESENTED.

May Petitioners, the trustees of a health and welfare trust fund established by collective bargaining for the benefit of construction laborers, recover payments agreed to be made into the fund with respect to work performed on federal projects in an action under the Miller Act against the prime contractor and its surety on payment bonds furnished pursuant to that Act?

The agreed payments fall into three categories as follows:

(a) Contributions in the sum of seven and one-half cents per hour which the prime contractor agreed to pay into the fund with respect to each hour worked by laborers on the project.

(b) Liquidated damages in the sum of $20 per delinquency or 10% of the amount of the contribution due, whichever is greater, which the prime contractor agreed to pay into the fund if he failed to make the agreed contribution prior to a delinquency date specified in the trust agreement.

(c) Reasonable attorneys fees, court costs and all other reasonable expenses incurred in connection with a suit for delinquent contributions, which the prime contractor had agreed should be added to his obligation in the event such a suit became necessary.

STATEMENT OF THE CASE.

I. The Nature of the Controversy.

Petitioners constitute the Board of Trustees of the Laborers Health and Welfare Trust Fund for Northern California (hereinafter referred to as the "Fund") which was established by collective bargaining for the benefit of laborers employed on construction projects in the 46 Northern Counties of California.

The collective bargaining agreements which provided for the establishment of the Fund were nego-

tiated in June, 1952, by two Chapters of The Associated General Contractors of America, Inc., on behalf of the contractor employers, and the Northern California District Council of Hod Carriers, Building and Construction Laborers of the International Hod Carriers, Building and Common Laborers' Union of America, on behalf of the employees (Admissions, Exh. C, R. 21). The agreements were so-called "Master Labor Agreements" which provided the wage rates and many other terms and conditions governing the employment of construction laborers in the Northern California area (R.50).

On the subject of health and welfare, the Master Labor Agreements provided that commencing on February 1, 1953, each individual employer covered by the agreements would contribute the sum of seven and one-half cents per hour for each hour worked by employees under the agreements to the Fund (Amended Complaint, par. X, R. 7-8).

The Fund itself was established by a Trust Agreement dated March 4, 1953, which was negotiated pursuant to the Master Labor Agreements by the parties to those agreements (Admissions, Exh. C., R. 21). The Trust Agreement provides that the Board of Trustees of the Fund shall have the power to demand and enforce the prompt payment of the contributions agreed to be paid to the Fund (Art. IV, sec. 3). It likewise provides that the contributions shall be payable in regular monthly installments on the fifteenth of the month following the month in which they accrue (Art. II, sec. 7); that any installment not

paid by the twenty-fifth of the month in which it comes due shall be delinquent, and the sum of $20 per delinquency or 10% of the amount of the contribution or contributions due, whichever is greater, shall thereupon become due and payable to the Fund as liquidated damages and not as a penalty (Art. II, sec. 8); and that if the Board files suit for any delinquent contributions or payments, "there shall be added to the obligation of the employer who is in default, reasonable attorneys' fees, court costs and all other reasonable expenses incurred by the Board in connection with such suit" (Art. IV, sec. 3).

Respondent Carter Construction Company was represented in collective bargaining by the Associated Home Builders of Sacramento, which was one of the contractor associations signatory to the Master Labor Agreements and to the Trust Agreement (R. 7, 21). The Company employed construction laborers on two construction projects for the United States Government, and thereafter defaulted in contributions due to the Fund for the months of February, March and April, 1953 (R. 9).

As required by the Miller Act (40 U.S.C., sec. 270a), the Carter Construction Company had provided a payment bond with respect to each of the Government projects. Petitioners brought this action against the Carter Construction Company and against respondent Hartford Accident and Indemnity Co., the surety on its bonds, to recover the delinquent health and welfare contributions, liquidated damages and attorneys fees. The action was brought in the District Court

pursuant to section 2(b) of the Miller Act (App. A., *infra*, p. iii).

II. The Nature of the Fund and the Health and Welfare Plan.

The Master Labor Agreements which provided for the initial establishment of the Fund, and which have since maintained the Fund in continuous existence, are the collective bargaining agreements which govern the employment of laborers on all construction projects of any size throughout the vast area comprising the 46 Northern Counties of California (hereinafter referred to as the "46-County area"). On the side of the employer, over 5,000 contractors and builders are bound to the agreements either through membership in one of the AGC Chapters or the 19 signatory associations (R. 21, Exh. C, p. 21) or by the deposit of written acceptances pursuant to Article IX of the Trust Agreement (R. 21, Ex. C., p. 19). On the side of the employee, over 20,000 construction laborers are represented by the Laborers District Council and work under the agreements.

The first provisions in these Master Labor Agreements calling for contributions to the Fund were negotiated in June, 1952 (R. 21, Exh. C., p. 2), at a time when wage controls established under the Defense Production Act of 1950 (Act of Sept. 8, 1950, c. 932, 64 Stat. 798, 50 U.S.C., App., secs. 2061 *et seq.*) were in effect.

Section 702 of the Defense Production Act of 1950 provided:

> "(e) The words 'wages, salaries, and other compensation' shall include all forms of re-

muneration to employees by their employers for personal services, including, but not limited to, vacation and holiday payments, night shift and other bonuses, incentive payments, year-end bonuses, **employer contributions to or payments of insurance or welfare benefits,** employer contributions to a pension fund or annuity, payments in kind, and premium overtime payments."[1]

The parties to the Master Labor Agreements were the customary parties who in accordance with customary practice negotiated the collective bargaining agreements establishing the prevailing wage rates for laborers employed on construction projects in the 46-County area, and the negotiations concerning contributions to the Fund were conducted in the light of the then current policy statements of the Construction Industry Stabilization Commission of the Wage Stabilization Board and subject to the regulations of that Commission, particularly including Regulation No. 2 dealing with Health and Welfare Plans (published on April 15, 1952, 17 F.R. 3351).

By resolution of the Construction Industry Stabilization Commission of March 20, 1952, approved on March 13, 1952, by the Wage Stabilization Board, W.S.B. Release No. 209, April 9, 1952, the Commission announced that until December 31, 1952:

"I. In acting upon applications for approval of increases in compensation for mechanics and laborers in the building and construction industry, the Construction Industry Stabilization

[1]Throughout this brief emphasis is ours unless otherwise noted.

Commission will be guided by the following policies:

* * * * * * *

"(B) *Fringe Benefits:* (1) In addition to wage increases approved under Section A of this Resolution, the Commission may also approve employer contributions of not more than 7½¢ to health and welfare funds limited to the payment of temporary disability benefits, hospital expense benefits, surgical expense benefits, medical benefits, term life insurance and accidental death and dismemberment benefits. The details of the policy are set forth in CISC Regulation 2 which provides for the approval of such contributions in addition to the increases allowable under Section A."

Section 2(b) of Regulation No. 2 of the Construction Industry Stabilization Commission provided, in part, as follows:

"(b) *Approval of agreements to establish plans.* If the parties desire to provide for payments into health and welfare funds prior to the establishment of a plan, the Commission, upon application under Section 4 hereof, will normally approve employer contributions in an amount not exceeding 7.5 cents per hour for each hour worked by his employees in job classifications to be covered by the plan, if but only if, the contributions are payable to a depository or trustees under a written agreement stipulating—

* * * * * * *

"(3) that no part of such fund will be paid to a labor organization or employees except in the form of the aforesaid health and welfare benefits, . . ."

During the time that intervened between the negotiation of the Master Labor Agreements which first provided for contributions into the Fund and March 4, 1953, when the negotiations for the Trust Agreement were concluded, the President issued Executive Order No. 10434 on February 6, 1953 (18 F.R. 809), suspending all wage and salary controls. Accordingly, when the Trust Agreement was signed, the above-quoted provisions of CISC Regulation No. 2 were no longer applicable.

The parties to the Trust Agreement, however, continued to be subject to the provisions of Section 302 of the Labor Management Relations Act of 1947 (61 Stat. 157; 29 U.S.C., sec. 186), and the provisions of the Agreement comply strictly with the requirements of subsection (c)(5) of that Section.[2]

---

[2]Section 302 provides, in pertinent part, as follows:

"(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

"(c) The provisions of this section shall not be applicable .... (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the fore-

Section 1 of Article II of the Trust Agreement provides for the creation of the Fund "which shall consist of all contributions required by the collective bargaining agreements to be made for the establishment and maintenance of the Health and Welfare Plan, and all interest, income and other returns thereon of any kind whatsoever". Section 1 of Article III provides that the Fund shall be administered by a Board of Trustees on which the employees and the employers are equally represented. Section 4 of Article IV provides that the Board of Trustees shall promptly use the moneys available in the Fund first to provide the benefits specified in the Health and Welfare Plan. Sections 1 and 2 of Article VII pro-

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going, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities."

vide that in the event the employer and employee representatives on the Board of Trustees deadlock on the administration of the Fund, the two groups shall agree on an impartial umpire to decide such dispute, or in the event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the United States District Court for the Northern District of California. Section 9 of Article IV provides for an annual audit of the Fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the Fund and at such other suitable places as the Board of Trustees may designate from time to time.

In addition to the provisions required by Section 302 of the Labor Management Relations Act, the Trust Agreement contains the following provisions which are pertinent to the question involved in this case:

Section 3 of Article II provides:

> "Contributions to the Fund shall not constitute or be deemed to be wages due to the employees with respect to whose work such payments are made, and no employee shall be entitled to receive any part of the contributions made or required to be made to the Fund in lieu of the benefits provided by the Health and Welfare Plan."

Section 4 of Article II provides, in part, as follows:

> "Neither the Employers, any signatory association, any individual employer, the Union, any beneficiary of the Health and Welfare Plan nor any other person shall have any right, title or interest in the Fund other than as specifically

provided in this agreement, and no part of the Fund shall revert to the Employers, any signatory association or any individual employer. Neither the Fund nor any contributions to the Fund shall be in any manner liable for or subject to the debt, contracts or liabilities of the Employers, any signatory association, any individual employer, the Union, or any employee. . . ."

Section 1 of Article IV provides:

"The Board of Trustees shall have the power to administer the Fund and to administer and maintain the Health and Welfare Plan in effect."

Section 3 of Article IV provides:

"The Board of Trustees shall have the power to demand and enforce the prompt payment of contributions to the Fund, and the payments due to delinquencies as provided in Section 8 of Article II. If any individual employer defaults in the making of such contributions or payments and if the Board consults legal counsel with respect thereto, or files any suit or claim with respect thereto, there shall be added to the obligation of the employer who is in default, reasonable attorneys' fees, court costs and all other reasonable expenses incurred by the Board in connection with such suit or claim."

Section 4 of Article IV provides:

"The Board of Trustees shall promptly use the moneys available in the Fund first to provide the benefits specified in the Health and Welfare Plan. The Board shall have power to enter into contracts and procure insurance policies necessary to place into effect and maintain the Health and

Welfare Plan, to terminate, modify or renew any such contracts or policies subject to the provisions of the Plan, and to exercise and claim all rights and benefits granted to the Board or the Fund by any such contracts or policies. Any such contract may be executed in the name of the Fund, and any such policy may be procured in such name."

Section 5 of Article IV provides:

"The Board of Trustees shall have power:

* * * * * * *

"(G) To adopt rules and regulations for the administration of the Fund and the Health and Welfare Plan which are not inconsistent with the terms and intent of this agreement and such Plan."

Section 2 of Article VIII provides, in part, as follows:

"No employee or other beneficiary shall have any right or claim to benefits under the Health and Welfare Plan, except as specified in the policy or policies, or contract or contracts, procured or entered into pursuant to section 4 of Article IV. . . ."

The Health and Welfare Plan which the Board of Trustees maintains in effect pursuant to the authority given in the Trust Agreement provides life insurance, accidental death and dismemberment insurance, hospitalization and surgical benefits, X-ray and laboratory expense payments and supplemental accident benefits for eligible laborers and their dependants (R. 39). The Board has provided by regulation that any laborer who works for one or more contributing employers at

least 400 hours in a designated six-month period shall be entitled to the benefits of the Plan for the succeeding six-month period (R. 40).

Thus, in the actual operation of the Fund and the Health and Welfare Plan, the contribution made by a contributing employer with respect to each hour of work by a particular laborer is paid into the Fund, and the Fund thereupon gives that laborer a credit which, when combined with credits for at least 399 additional hours of work for that employer or any other contributing employer during a six-month period, entitles the laborer to participate in the substantial benefits provided by the Plan.

III. The Decisions Below.

Petitioners and respondent surety entered into a stipulation of facts in the District Court (R. 13-21) which was made the basis for a motion and cross-motion for summary judgment (R. 11-12, 23-23). The District Court granted respondent surety's motion for summary judgment (R. 24-27), and petitioners appealed from the resulting judgment (R. 28-29).

The Court of Appeals affirmed the judgment of the District Court, writing a brief opinion which is printed as Appendix B to the petition for certiorari (pp. vi-x). In this opinion the Court first noted that the question before it was one "of first impression"; it then distinguished a case recently decided in favor of petitioners in the State court (*Sherman v. Achterman*, App. C to Petition for Certiorari, pp. xii-xxiii) on the ground that the case involved a payment bond

required by a State statute; and finally, since it was conceded that petitioners themselves had not actually furnished labor for the bonded projects, it concluded that petitioners could not bring themselves within the letter of the Miller Act.

SUMMARY OF ARGUMENT.

If the parties to the Master Labor Agreements had agreed that the wages of the construction laborers would be increased by seven and one-half cents per hour and that this wage increase would be contributed by their employers to the Fund, it would be conceded that the contributions to the Fund would have been a part of the compensation for the services furnished by the laborers. Because of existing wage controls, and because of practical considerations connected with setting up a workable health and welfare plan for casual employees such as construction laborers, the parties did not adopt this course, but instead provided that the employers would make their contributions directly to the Fund and that such contributions would be free of any claim of the employees with respect to whose work they were made.

Notwithstanding this approach to the problem of setting upon a health and welfare plan, however, it is clearly apparent from the entire transaction that in the minds of the parties and in actual fact, the contributions to the Fund constituted an important part of the agreed consideration for the services of the laborers. This view of the intrinsic nature of em-

ployer contributions to welfare funds is shared by Congress, which has stated its view that such contributions are to be considered and treated as a part of the compensation of the employees with respect to whose work the contributions are made.

When the contributions in suit are considered in this light, it is apparent that the terms of the Miller Act cannot be satisfied unless the contributions are held to be within the coverage of the payment bond required by that Act. The Act, by its terms, contemplates that the payment bond shall be security for the payment *in full* of the agreed compensation for the labor furnished to a federal public works project, and until the contributions due the Fund have been made, the labor to which such contributions relate has not been paid for in full.

The provision of the Act stressed by the court below, namely, that the sums sought to be recovered be "justly due" to the persons who furnished the labor, does not bar a recovery by petitioners. This Court has held that this provision does not bar a recovery on the bond by assignees of the persons who furnished the labor, since otherwise the purpose of the Act to protect and benefit the laborers would be defeated. Petitioners are not only assignees in equity of the laborers but they are also more truly representative of the laborers than assignees would be, since they sue as trustees for the benefit of the laborers and not for their personal account.

The conclusion that the payment bond required by the Miller Act should be construed to cover health and

welfare contributions is further confirmed by the fact that such construction of the bond is necessary to protect federal public works projects against disruption and delay by reason of enforcement action which would otherwise be necessary to secure payment of the contributions. A failure to pay the contributions is a breach of the collective bargaining agreements which provide for the contributions and under which the federal projects are manned. Such breach would justify the laborers in withholding or withdrawing their services, thus effectively preventing performance of the federal projects.

Insofar as petitioners' claim for liquidated damages and attorneys' fees are concerned, the obligation to pay these sums in the event of default is a part of the total obligation assumed by the prime contractor in consideration for the services supplied to him by the laborers. Accordingly, these sums are likewise covered by the payment bonds supplied by respondent surety.

ARGUMENT.

I.

THE CONTRIBUTIONS AGREED TO BE PAID TO THE FUND ARE A PART OF THE COMPENSATION OF THE LABORERS WITH RESPECT TO WHOSE WORK THEY ARE PAYABLE, AND UNTIL SUCH CONTRIBUTIONS HAVE BEEN MADE, THE LABORERS HAVE NOT BEEN PAID IN FULL FOR THEIR LABOR.

If the parties to the Master Labor Agreements had approached the problem of establishing a health and welfare plan for construction laborers by providing

for a wage increase of seven and one-half cents per hour and then for the deduction of this amount from the wages of the laborers and payment of the amount into the Fund, there could have been no dispute as to the fact that such payment would be a part of the compensation for the services rendered by the laborers.

At the time the agreement to make contributions into the Fund was negotiated, however, this alternative was not available. Federal wage controls were then in effect, and the governing policies and regulations announced by the Construction Industry Stabilization Commission, quoted *supra* at pp. 7-8, indicated that such an approach to the problem would not be approved.

Equally important, further, was the fact that the casual nature of employment in the building and construction industry made direct employer contributions into the Fund, unfettered at the point of contribution by the possible claims of the individual workmen, a practical necessity.

The parties could not hope to provide health and welfare benefits to each employee who performed one hour of work subject to one of the Master Labor Agreements. Provision had to be made for the establishment of reasonable eligibility rules which would fix a minimum period of employment under the Agreements as a prerequisite to insurance coverage. Accordingly, it was essential to give the Board of Trustees the power to establish such rules, and to divest the individual employees of any claim to the

contributions which might interfere with the exercise of such power.

In addition, regulatory laws applicable to employment in the building and construction industry required that the Trust Agreement clearly state that the individual employees would have no claim to the contributions to the Fund on any theory that such contributions constituted "hourly wages" within the traditional concept of that term.

The Davis-Bacon Act (46 Stat. 1494; 40 U.S.C., secs. 276a-276a-7) requires that on federal public works projects the prime contractor and his subcontractors must pay all mechanics and laborers employed directly upon the site of the work, "unconditionally and not less often than once a week, and without subsequent deduction or rebates on any account," the full amount of the prevailing wages determined by the Secretary of Labor pursuant to that Act. While certain deductions from these wages are permitted by the Anti-Kickback Regulations of the Secretary of Labor (Code of Fed. Reg., tit. 29, subtit, A, pt. 3, secs. 3.1-3.9), deductions for payments to health and welfare funds are not specifically approved in the regulations and therefore any plan which was construed to involve such deductions would require specific applications to the Secretary for approval on every project affected (ibid., sec. 3.5(b).[8]

[8]Section 3.5(b) of the Anti-Kickback Regulations provides as follows:

"(b) Any deduction is also permissible which in fact meets the following standards, and with respect to which the contractor or subcontractor shall have made written application by

The Fair Labor Standards Act (52 Stat. 1060, as amended; 29 U.S.C., secs. 201 *et seq.*) provides in section 7(d) (29 U.S.C. 207(d)) that in computing the "regular rate" of an employee for purposes of overtime an employer may exclude

> "(4) contributions irrevocably made . . . to a trustee or third person pursuant to a bona fide plan for providing old age, retirement, life, accident, or health insurance or similar benefits for employees."

Under the interpretations of the Wage and Hour Administrator, this exclusion is lost if the health and welfare plan gives the employee "the option to receive any part of the employer's contributions in cash instead of the benefits under the plan" (Code of Fed.

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registered mail to the Secretary of Labor, a copy of which application shall be sent to the contracting agency by the contractor or subcontractor, setting forth all the pertinent facts indicating that such deductions will meet the following standards:

(1) That such deduction is not prohibited by other law; and

(2) That such deduction is (i) voluntarily consented to by the employee in writing and in advance of the period in which the work was done, and that consent to the deduction is not a condition either for the obtaining of or for the continuance of employment; or (ii) that such deduction is for the benefit of the employees or their labor organization through which they are represented and is provided for in a bona fide collective bargaining agreement; and

(3) That from such deduction no payment is made to, nor profit or benefit is obtained directly or indirectly by the contractor or subcontractor or any affiliated person, and that no portion of the funds, whether in the form of a commission or otherwise will be returned to the contractor or subcontractor or to any affiliated person; and

(4) That the convenience and interest of the employees are served thereby, and that such or similar deductions have been customary in this or comparable situations."

Reg., tit. 29, pt. 778, sec. 778.6(g)(3)(v)). Accordingly, in order not to complicate the computation of overtime, it was essential to make clear that the individual laborer had no claim to his employer's contributions.

The State law likewise presented problems which could not be ignored. Section 204 of the California Labor Code provides that "all wages . . . earned by any person in any employment are due and payable twice during each calendar month." Section 224 of the same Code provides that an employer may withhold or divert a portion of an employee's wages "when a deduction is expressly authorized in writing by the employee." Sections 10202.8 and 10270.5 of the California Insurance Code prohibit the issuance of a group life insurance policy or a group disability insurance policy to trustees of an industry fund where "the entire premium is to be derived from funds contributed by the insured persons specifically for their insurance."

That the parties' concern with these legal provisions was not fanciful is illustrated by the decision of the Federal District Court in *International Woodworkers, Local 6-64, CIO v. McCloud River Lumber Co.* (N.D. Cal. 1953) 119 F. Supp. 475, wherein the court held that under a health and welfare plan financed by a wage deduction which equalled a wage increase negotiated by the union, section 224 of the California Labor Code required that individual written authorizations be obtained from all of the employees involved. Such a requirement imposed upon a health and wel-

fare plan of the size of the Laborers Plan would have made the plan completely unworkable.

For all of the foregoing reasons, the parties to the Master Labor Agreements provided in the Trust Agreement, as already noted (*supra*, p. 11), that contributions to the Fund shall not "constitute or be deemed to be wages due to the employees with respect to whose work such payments are made" and that "no employee shall be entitled to receive any part of the contributions made to the Fund in lieu of the benefits provided by the Health and Welfare Plan." (Art. II, sec. 3).

It clearly appears from the entire transaction, however, that in the minds of the parties and in actual fact, the agreement of the employers to make contributions to the Fund was an important part of the consideration to be paid for the services of the laborers who were to work under the Master Labor Agreements. The obligation to make such contributions was a part of the same collective bargaining agreements which fixed the hourly wage rates to be paid to the laborers. As developed later in greater detail (*infra*, pp. 33-34), the obligation was negotiated on behalf of the laborers by their established collective bargaining representative, and at the time of such negotiations, the obligation represented an increase in compensation within the meaning of the Defense Production Act of 1950 which at that time required prior approval of the Construction Industry Stabilization Commission to become effective (*supra*, pp. 7-8). The contribution with respect to each hour of work of a particular

laborer gave that laborer an important and valuable right, namely, a credit toward insurance coverage by the Fund which could result in payments to the laborer or his beneficiaries greatly exceeding the amount of the total contributions made on his behalf. Consequently, these contributions constituted, in a very real and immediate sense, a part of the compensation agreed to be paid for the services of the laborers.

The matter was well expressed by the Oregon Supreme Court in *Coos Bay Lumber Company v. Local 7-116, International Woodworkers of America, CIO* (1955) 203 Or. 342, 279 P. (2d) 508, *reh'g. den.*, 280 P. (2d) 412, when it said (279 P. (2d) 512):

> "Although in the cases just reviewed no distinction arose between employer-paid and employee-paid insurance programs, the Potlatch and Inland Steel decisions plainly decided that the term 'wages' as used in the Labor Management Relations Act embraces what, for convenience, may be referred to as employer-paid plans. Since such plans are mandatory subjects for collective bargaining, a union has authority to obtain a wage increase for its members in the form of an employer-paid insurance plan. It follows, therefore, that it also has the power to obtain a wage increase to be applied for the purchase of insurance as the union directs. **Both situations involve substantially the same thing: a wage increase which takes the form of group insurance. As compared with the situation where a collective bargaining agreement provides for a so-called employer-paid plan, a contract between an employer and a union, such as the one before us, only indicates more specifically what such a group insurance plan**

really is when it provides that it is to be financed by a wage increase. Therefore, the distinction between employer-paid and employee-paid plans, is at best one of form, not of substance, and the rights of the parties are the same in the two situations. *International Woodworkers of America, Local 6-64, C.I.O. v. McCloud River Lumber Co., D. C.,* 119 F. Supp. 475, 486, in interpreting the provisions of a health and welfare insurance program substantially the same as the one before us, said:

> "'To this Court, the difference between a "wage increase intended as the method of financing the health and welfare plan" and "a wage increase to pay for a Health and Welfare Program for the employees" seems like the difference between tweedledum and tweedledee!'"

Further, there can be no possible question but that Congress considers that employer contributions to negotiated health and welfare funds are a part of the agreed compensation for the services of the employees with respect to whose work the contributions are made.

By section 302 of the Labor Management Relations Act, already quoted *supra,* pp. 9-10, Congress undertook to impose strict limitations and regulations upon the administration of such funds for the protection of the individual employees. In so legislating, it acted upon the basic premise that the payments by employers into such funds were in consideration for the services of the employees and should be expended solely for the benefit of such employees.

The Senate Committee on Labor and Public Welfare reported concerning this provision of the Labor Management Relations Act as follows (S. Rep. No. 105, 80th Cong., 1st Sess., p. 52):

> "An amendment reinserting in the bill a provision regarding so-called welfare funds similar to the section in the Case bill approved by the Senate at the last session [is proposed]. It does not prohibit welfare funds but merely requires that, if agreed upon, such funds be jointly administered —be, in fact, trust funds for the employees, with definite benefits specified, to which employees are clearly entitled, and to obtain which they have a clear legal remedy. The amendment proceeds on the theory that union leaders should not be permitted, without reference to the employees, to divert funds paid by the company, **in consideration of the services of employees**, to the union treasury or the union officers, except under the process of strict accountability.
>
> ". . . It seemed essential to the Senate at that time, and today, that if any such huge sums were to be paid, **representing as they do the value of the services of the union members, which could otherwise be paid to the union members in wages**, the use of such funds be strictly safeguarded."

In more recent years Congress has resumed its study of negotiated welfare and pension funds, proceeding upon the same basic assumption expressed in the above cited committee report, namely, that contributions to such funds are an integral part of the consideration for the services of the employees involved.

In an interim report on "Welfare and Pension Plan Investigation", January 10, 1954, 84th Congress, 1st Session, at p. 3, the Subcommittee on Welfare and Pension Funds of the Senate Committee on Labor and Public Welfare reported that welfare plans are today "part and parcel of the entire fabric of wages and working conditions in an employee's 'contract of employment.'"

In its final report on the "Welfare and Pension Plans Investigation", made pursuant to S. Res. 225 (83d Congress) and S. Res. 40 as extended by S. Res. 200 and S. Res. 232 (84th Congress), and submitted April 6, 1956 (Sen. Report No. 1734, 84th Cong., 2d Sess.), the Subcommittee reported (pp. 3-6):

> "These employer-employee plans, whether or not collectively bargained, or whether contributed to solely by management, or on a joint management-employee basis, actually, and under existing law, proceed **on the basis that the contributions to them by management are in the nature of employees' compensation for employment or, stated in another way, '. . . that the cost of an employee's service is greater than the amount currently paid him as wages.'** . . . We find that it has not followed that the employees accordingly have a right to know the cost of the programs, how the money is spent, the reserves maintained, and how the programs are managed."
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> * * * * * * *
>
> "The subcommittee, on the basis of its studies and investigations, makes the following findings and conclusions:

"1. Private employee welfare and pension programs have grown to such proportions in this country and involve the use of such large tax-exempt funds as to place upon the Government a grave responsibility for their sound operation and to protect the equities of the beneficiaries and the public interest.

* * * * * * *

"(d) Since Congress has stated and the courts have held that employer contributions toward welfare and pension benefits are **in the nature of compensation to employees**, it must be concluded that whether the funds for such programs are contributed by the employers, the employees, or both, the employees have a right to know the financial details of such plans as well as to have their interest in such plans protected."

It is apparent from the foregoing that, in the eyes both of the parties to the Master Labor Agreements and of Congress, the contributions agreed to be paid to the Fund are a part of the compensation of the laborers with respect to whose work they are payable, and until such contributions have been made, the laborers have not been paid in full for their labor.

II.

THE PROVISIONS OF THE MILLER ACT CAN AND SHOULD BE CONSTRUED AS EXTENDING THE PROTECTION OF THE PAYMENT BOND REQUIRED BY THAT ACT TO THE PORTION OF THE LABORERS' COMPENSATION REPRESENTED BY CONTRIBUTIONS TO THE FUND.

A. This conclusion follows when the Act is construed from the standpoint of the protection of the individual laborer.

When the Miller Act is construed in the light of the clearly expressed view of Congress concerning the nature of employer contributions to health and welfare plans, it is obvious that the terms of the Act cannot be satisfied unless such contributions are held to be within the coverage of the payment bond required by the Act.

The bond is required to be furnished "for the protection of all persons supplying labor . . . in the prosecution of the work . . ." A right of action on the bond is given to "[e]very person who has furnished labor . . . in the prosecution of the work . . . and who has not been paid **in full** therefor . . ."

A laborer who has performed work on a federal project pursuant to the Master Labor Agreements has not been paid "in full" for such work until the contractor has paid the agreed contributions to the Fund required by the Agreements with respect to such work. If these contributions were held not to be covered by the bond, the laborer would not receive the protection promised by the Act as to this portion of his compensation.

Upon this analysis, which we submit is correct, the issue becomes one as to whether the terms of the Act emphasized by the court below, namely, the provision

that the action on the bond be for "sums justly due" the person who actually furnished the labor, should be construed as a limitation upon the important benefits intended to be conferred on laborers by the Act. We will therefore address our argument to this issue.

The basic consideration which governs the resolution of the issue was stated by this Court in *Hill v. American Surety Co.* (1906) 200 U.S. 197.

In the *Hill* case this Court had before it the question whether a statute which required a contractor's bond conditioned "that such *contractor or contractors* shall promptly make payments to all persons supplying *him or them* labor or materials in the prosecution of the work provided for in such contract" (200 U.S. 201), gave protection to a claimant who had furnished services and materials to a subcontractor. It is apparent from the words we have italicized that if this Court had followed the approach adopted by the court below in this case, it would have answered the question in the negative. Instead, it answered in the affirmative, saying (p. 203):

> "But we must not overlook, in construing this obligation, the manifest purpose of the statute to require that material and labor actually contributed to the construction of the public building shall be paid for and to provide a security to that end.
>
> Statutes are not to be so literally construed as to defeat the purpose of the legislature. 'A thing which is within the intention of the makers of the statute, is as much within the statute, as if it were within the letter.' *United States v. Freeman*, 3 How. 556. **'The spirit as well as the letter of a**

> **statute must be respected, and where the whole context of a law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent.'** Chief Justice Marshall in *Durousseau v. United States,* 6 Cranch, 307."

In all of the decisions which have succeeded the *Hill* case, this Court has consistently heeded the admonition of that case concerning respect for the spirit of the statute and the intent of its makers. The considerations stated in the *Hill* case were reiterated in *Title Guaranty & Trust Co. v. Crane Co.* (1910) 219 U.S. 24, 32 (holding that a wooden steamer was a "public work" within the meaning of the statute), in *A. Bryant Co. v. N. Y. Steam Fitting Co.* (1914) 235 U.S. 327, 337, and *Fleischmann Co. v. United States* (1926) 270 U.S. 349, 360 (construing and reconciling the ambiguous time limitations of the Heard Act), in *Standard Ins. Co. v. United States* (1938) 302 U.S. 442, 444 (holding that a railroad which transports material for a public structure furnishes "labor" within the meaning of the statute) and in *Fleisher Co. v. United States* (1940) 311 U.S. 15, 17 (holding that the provisions of the Miller Act specifying the method of serving notice on the prime contractor are directory only).

The court below acknowledged that the case before it was one of "first impression" (App. B to Pet. for Cert., p. viii), but it gave no consideration whatever to the pertinency of the *Hill* case and the many other applicable decisions of this Court to the solution of the question presented to it. It is not surprising,

therefore, that the court's conclusion that "recovery on a Miller Act bond is limited to persons who have 'furnished labor or material in the prosecution of the work provided in said contract' " (App. B. to Pet. for Cert., p. viii) is in direct conflict with decisions of this Court.

In *Title Guaranty & Trust Co. v. Crane Co.* (1910) 219 U.S. 24, this court held that an assignee of the persons who furnished labor and materials to a project can sue on the bond. Speaking tersely and to the point, it said (p. 35):

> "The assignment of some of the claims did not affect the remedy. *United States v. Rundle,* 100 Fed. Rep. 400."

In the *Rundle* case the court explained its holding as follows (100 Fed. 403):

> "The general rule is that an assignment of a debt carries with it the security. The application of this general principle to such cases as the present accords with the obvious purpose of the statute, **while the limited construction contended for by the defendants in error might very well deprive those for whom the security was intended from realizing on their claims by assignment.**"

To the same effect, see:

U. S. Fidelity Co. v. Bartlett (1913) 231 U.S. 237;

Bartlett & Kling v. Dings (8th C.C.A. 1918) 249 Fed. 322, 325;

United States v. Brent (W.D.S.C. 1916) 236 Fed. 771, 777.

The court below summarized its holding as follows (App. B to Pet. for Cert., pp. ix-x):

> "The appellants [petitioners] are not persons who furnished labor or materials and therefore may not maintain an action for recovery on the bond. Even if we were to assume that they were authorized to maintain the action for and on behalf of persons who furnished labor, recovery could not be had because the delinquent payments sought to be recovered are not 'sums justly due' the persons who furnished the labor."

Assignees of laborers and materialmen are not "persons who furnished labor or materials" and yet this Court has held that they may maintain actions for recovery on Miller Act bonds. Where an assignment of labor claims has been made, the sums claimed are no longer "justly due" to the persons who furnished the labor, yet under the decisions of this Court, such fact has not barred the assignee from a recovery.

When the spirit and intent of the Miller Act are considered, petitioners, as trustees for the men who furnished labor to the projects, have a more direct claim to the security of the bonds than assignees of such workmen would have. When a laborer assigns his claim against a defaulting contractor he frequently does so at a discount, and when the assignee sues for the full amount of the claim, he acts in part for his personal benefit. Petitioners as trustees, on the other hand, are suing for the sole benefit of the laborers and whatever they recover will enure in its entirety to the benefit of such laborers.

Further, under California law petitioners are the assignees under an equitable assignment of the rights and claims of the laborers (*Matter of Schmidt* (S.D. Calif. 1953) 24 CCH Labor Cases, par. 68,012). In the leading case of *McIntyre v. Hauser* (1900) 131 Cal. 11, the California Supreme Court said (p. 14):

> "In order to constitute an equitable assignment of a debt, no express words to that effect are necessary. **If from the entire transaction it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment will be held to have taken place.**"

To the same effect, see:

Goldman v. Murray (1912) 164 Cal. 419, 422.

It clearly appears from the entire transaction whereby the Fund administered by petitioners was established that the construction laborers who are the beneficiaries of the Fund have assigned to petitioners all of their rights in the portion of the consideration for their services which their employers have agreed to pay into the Fund. By the terms of the Trust Agreement the laborers are divested of any right to receive any part of the contributions to the Fund (R. 21, Exh. C, Art. II, Sec. 3) and petitioners are expressly given the right and authority to enforce the prompt payment of such contributions (Art. IV, Sec. 3).

In negotiating the Master Labor Agreements and the Trust Agreement, the Northern California District Council of Hod Carriers, Building and Construction Laborers acted as the collective bargaining repre-

sentative of the laborers. The health and welfare plan was a proper subject of collective bargaining (*National Labor Relations Board v. W. W. Cross & Co.* (1st C.C.A. 1949) 174 F. (2d) 875), and the Laborers Council had the power and authority to bind the laborers to all of the terms and conditions of the plan, including those of the Trust Agreement (*Ford Motor Co. v. Huffman* (1953) 345 U.S. 330, 337; *Potlatch Forests v. International Woodworkers* (D. Ida. 1951) 108 F. Supp. 906, *aff'd* (9th C.C.A. 1953) 200 F. (2d) 700; *Coos Bay Lumber Company v. Local 7-116, International Woodworkers of America* (1955) 203 Or. 342, 279 Pac. (2d) 508, 512 *reh'g den.*, 280 Pac. (2d) 412). The Laborers Council therefore had authority to assign and did assign to petitioners, on behalf of the laborers, the rights of the latter in the health and welfare contributions which, in the words of the Senate Committee on Labor and Public Welfare, quoted *supra*, p. 25, "could otherwise be paid to the union members in wages."

It follows that in bringing this action to recover delinquent contributions petitioners are more truly representative of the laborers who actually performed services on the bonded projects than assignees would be. Their right to sue in their own names for the benefit of such laborers is clear under the decisions of this Court (*Stone v. White* (1937) 301 U.S. 532, 536; *Vetterlein v. Barnes* (1887) 124 U.S. 169, 173; *Kerrison, Assignee v. Stewart* (1876) 93 U.S. 155, 160), under the Federal Rules of Civil Procedure (Rule 17(a)) and under the statutory and decisional

law of California (California Code of Civil Procedure, section 369; *Thorpe v. Story* (1937) 10 Cal. (2d) 104, 114; *City of Oakland v. California Construction Co.* (1940) 15 Cal. (2d) 573, 578; *City of Oakland v. De Guarda* (1928) 95 Cal. App. 270, 285). Indeed, the parties considered petitioners' right to sue so clear that such right was conceded by respondent surety in the District Court. Counsel for respondent there said (R. 33): "[We] are not making any issue as to their [petitioners'] right to bring this action . . . We are not interested in raising any question of right to sue, capacity or any such matters."

In the light of the foregoing, no undue stretching of the terms of the Miller Act would be required by a holding that the sums which petitioners seek to recover in this action are "justly due" to the workmen who furnished labor to the bonded projects and that petitioners have the right under the Act to recover such sums from respondent as the equitable assignees of, and as trustees for, such laborers. Such a holding, we submit, is the only one which would be consistent with the spirit and intent of the Miller Act and with the long line of decisions of this Court which have construed the Act and its predecessor statutes liberally to effectuate such spirit and intent (*Guaranty Co. v. Pressed Brick Co.* (1903) 191 U.S. 416, 426; *Hill v. American Surety Co.* (1906) 200 U.S. 197, 203; *Mankin v. Ludowici-Celadon Co.* (1910) 215 U.S. 533, 537; *Title Guaranty & Trust Co. v. Crane Co.* (1910) 219 U.S. 24, 32; *Equitable Surety Co. v. McMillan* (1914) 234 U.S. 448, 455; *A. Bryant Co. v.*

N. Y. Steam Fitting Co. (1914) 235 U.S. 327, 337; *Fleischmann Co. v. United States* (1926) 270 U.S. 349, 360; *Standard Ins. Co. v. United States* (1938) 302 U.S. 442, 444; *Fleisher Co. v. United States* (1940) 311 U.S. 15, 17).

B. The conclusion above-stated likewise follows when the Act is construed from the standpoint of the protection of the United States Government.

This Court has held that the Miller Act was enacted not only for the protection of the individual laborers and materialmen but also for the protection of the United States Government against the disruption and delay of its public works projects which would result if the laborers or materialmen sought other means of enforcing their just claims.

In *Standard Ins. Co. v. United States* (1938) 302 U.S. 442, in holding that freight charges of a railroad constitute "labor" within the meaning of a payment bond, this Court said (pp. 443-445):

> "Petitioner maintains that freight cannot be considered as 'labor or material' without doing violence to the words of the statute; also that Congress did not intend to extend further protection to carriers who could enforce their lien for charges by retaining and selling the materials.
>
> *Stuart for use of Florida East Coast Ry. Co. v. American Surety Co.*, Circuit Court of Appeals Fifth Circuit (1930) *supra* carefully considered and denied these defenses and stated reasons therefor which we deem adequate. This was followed by the court below in the present cause.
>
> * * * * * * *

> Nor do we find reason for excluding the carrier from the benefit of the bond because it might have enforced payment by withholding delivery. The words of the enactment are broad enough to include a carrier with a lien. Nothing in its purpose requires exclusion of a railroad. **Refusal by the carrier to deliver material until all charges are paid might seriously impede the progress of public works, possibly frustrate an important undertaking.**"

In *City of Stuart v. American Surety Co.* (5th C.C.A. 1930) 38 F. (2d) 193, to which this Court had referred with approval in the *Standard Ins. Co.* case, the court said (p. 195):

> "In addition to protecting the honest claims of persons who have contributed to the performance of the job, the legislative intent no doubt was also **to minimize impediment and delay of the work, and facilitate procurement of labor and materials, through the security afforded by the bond.** If the carrier is included in its benefits, this intent will be served. If he is not included, he must hold the freight until payment is made, and sell it for charges if it is not, to the embarrassment of the work."

The reasoning of the court in the *Standard Ins. Co.* case applies with peculiar force to claims for health and welfare contributions. As we have pointed out, the obligation to make these contributions is imposed by the Master Labor Agreements with the Northern California District Council of the Laborers Union. Every major construction project in Northern California is manned under the terms and conditions of

these agreements, and the right of the individual contractor to procure laborers for his projects is dependent upon adherence to and compliance with these Master Agreements.

Since it has been stipulated that the agreement to make health and welfare contributions was part of the consideration for the services of the laborers who worked on the bonded projects (R. 7-9, 13), a breach of that agreement would clearly entitle the laborers to withdraw their services, and their union to exercise its economic power of striking and picketing to remedy the default (*Sherman v. Achterman,* App. C. to Pet. for Cert. p. xv; *William Dunbar Co., Inc. v. Painters & Glaziers Dist. Coun.* (D.C.D. of C. 1955) 129 F. Supp. 417, 424). Therefore, the holding of the court below, that building tradesmen are not entitled to the protection of a Miller Act bond insofar as payments to welfare funds are concerned, leaves every federal project in the vast areas in which such funds are now established vulnerable to interruption and delay if the contractor becomes delinquent in his payments. For this reason, just as in the freight cases, a holding that health and welfare contributions are covered by the security of the bond is important to the protection of the Government as well as of the individual laborer.

III.

THE OBLIGATION TO PAY LIQUIDATED DAMAGES AND ATTORNEYS' FEES IN THE EVENT OF A DEFAULT IS A PART OF THE TOTAL OBLIGATION ASSUMED BY THE PRIME CONTRACTOR IN CONSIDERATION FOR THE SERVICES SUPPLIED TO HIM, AND CONSEQUENTLY THIS OBLIGATION IS LIKEWISE COVERED BY THE PAYMENT BONDS.

At the time the Health and Welfare Plan was negotiated with the Laborers Council, the contractors were concerned about the uncertain liabilities which might be involved in an agreement to make contributions to a fund to provide insurance for their employees. Specifically, they were concerned with a claim made by the Council that a delinquent employer could be held liable for the full amount of any insurance benefits lost through such delinquency (see *Frankel, The Health and Welfare Trust: Damages for Failure to Contribute* (1954) 5 CCH Labor Law Journ. 28). Various provisions protecting against any such uncertain liability were negotiated as a part of the Trust Agreement, including the following provision of Section 8 of Article II (Exh. C, R. 21):

> ". . . The parties recognize and acknowledge that the regular and prompt payment of employer contributions to the Fund is essential to the maintenance in effect of the Health and Welfare Plan, and that it would be extremely difficult, if not impracticable to fix the actual expense and damage to the Fund and to the Health and Welfare Plan which would result from the failure of an individual employer to pay such monthly contributions in full within the time above provided. Therefore, the amount of damage to the Fund and Health and Welfare Plan

resulting from any such failure shall be presumed to be the sum of $20 per delinquency or 10% of the amount of the contribution or contributions due, whichever is greater, which amount shall become due and payable to the Fund as liquidated damages and not as a penalty, in San Francisco, California, upon the day immediately following the date on which the contribution or contributions become delinquent and shall be in addition to said delinquent contribution or contributions."

The parties likewise provided in Section 3 of the Article IV of the Trust Agreement (R. 21) as follows:

"The Board of Trustees shall have the power to demand and enforce the prompt payment of contributions to the Fund, and the payments due to delinquencies as provided in Section 8 of Article II. If any individual employer defaults in the making of such contributions or payments and if the Board consults legal counsel with respect thereto, or files any suit or claim with respect thereto, there shall be added to the obligation of the employer who is in default, reasonable attorneys' fees, court costs and all other reasonable expenses incurred by the Board in connection with such suit or claim."

Under these provisions the obligation to pay liquidated damages and reasonable attorneys' fees in the event of default is an integral part of the total obligation of the defendant contractor to make health and welfare contributions with respect to the services of laborers working on its Government projects. Liquidated damages and attorneys' fees were a part

of the agreed payment for labor which was held to be recoverable against the surety in *Sherman v. Achterman, supra,* and as a part of such agreed payment, they should also be recoverable against the surety under a Miller Act bond.

United States v. Breeden (D. Alaska 1953) 110 F. Supp. 713;

United States v. Henley (D. Ida. 1954) 117 F. Supp. 928.

In *United States v. Breeden, supra,* the court said with respect to attorneys' fees (p. 715):

> "We must first consider the precise language of the Miller Act in this respect, which is that the payment bond is given 'for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person.' No specific limitation has been found in this act or any other Federal law which forbids the allowance of attorneys' fees as part of costs for the persons who are obliged to bring suit on surety company's bonds. The text of the law would indicate it must have been the purpose of Congress to protect all persons supplying labor and material in the prosecution of work upon such contracts. Surely, the Congress cannot have contemplated that the persons supplying such labor and material should be obliged, in the event of the default of the contractors, to pay to their own attorneys without recompense a substantial portion of the amounts actually due them for the labor and materials supplied to the contractors. Such a rule would penalize the suppliers to the advantage of the sureties on the contractors' bonds. **The protec-**

tion demanded by the law is full protection to the suppliers and not partial protection, as would be the case if the attorneys' fees of the suppliers who are obliged to bring suit, could not be taxed as a part of the costs."

CONCLUSION.

This case, and the *Achterman* case in the State court, are cases "of first impression" which present one aspect of the problem of making the manifest benefits of low-cost group health insurance available to the men who perform the casual employment which characterizes the building and construction industry.

The widespread utilization of group health insurance is a modern development but the social desirability and need for such insurance is attested by the rapidity of its growth.

In its final report on the "Welfare and Pension Plans Investigation," already referred to (*supra,* pp. 26-27), the Subcommittee on Welfare and Pension Funds of the Senate Committee on Labor and Public Welfare reported as follows (Senate Report No. 1734, 84th Cong., 2d Sess., p. 2):

> "From 1945 to 1954 the number of persons covered by group life insurance more than doubled—from 11.4 to 28.7 million. In the same period, those covered by insurance companies under group hospital expense policies increased more than fourfold—from 7.8 to 35.1 million—while those covered by Blue Cross plans rose from 19 to 44 million. A similar growth took place in

the number of employees covered by private pension plans—from 5.6 to 12.5 million in the decade 1945-54.

"Today an estimated 75 million individuals—workers and their dependents—rely upon some form of group benefits program to meet the contingencies of sickness, accident, old age, and death. The plans or insurance policies underlying all programs number approximately half a million. Total contributions to all programs in 1954 reached an estimated $6.8 billion. Reserves of pension funds aggregate $20 to $25 billion.

"The existence of welfare and pension programs is a tribute to the free enterprise system. **They constitute an important underpinning of our economic security, broadening and supplementing the various governmental programs.**"

A large industry-wide health and welfare plan, such as the one administered by petitioners for the construction laborers in Northern California, provides the most economical and effective means of making health insurance benefits available to building tradesmen. Under such a plan many small contractors and builders, by contributing a fixed amount per hour of work to a central trust fund, can provide benefits for their employees far in excess of those which they could purchase for the same money as individual employers. Conversely, under the plan building tradesmen who are required by the nature of their employment to shift continually from one employer to another can pool their credits with the central fund so as to secure continuous insurance coverage without

regard to the number of employers for whom they work or the period of their employment with any single employer. The central trust fund, administered by trustees who are chosen representatives of employers and employees in the industry, provides an essential focal point, to which the contributions of thousands of employers can be directed, which can purchase insurance coverage at a minimum cost from a single carrier and which can receive and pay promptly the claims originating from the thousands of employees and dependents who are covered by the health and welfare plan.

Using petitioners' Fund by way of illustration, during the fiscal year of the Fund which ended May 31, 1956, over 5000 individual employers contributed a total of $3,297,786 to the Fund. The Fund during that year provided over 18,000 construction laborers with insurance coverage for themselves and their dependents consisting of $2000 life insurance on the employee, plus accidental death and dismemberment insurance in the amount of an additional $2000; life insurance on dependents ranging from $100 to $1000 depending upon age; and hospital and surgical benefits for the non-occupational injury or illness of the employee and his dependents, consisting of full reimbursement for the cost of ward service in a hospital for a maximum of 70 days, reimbursement for special hospital charges in full up to $400 plus 75% of charges over $400, surgical expense benefits under a $300 surgical schedule, reimbursement for doctor's home, office and in-hospital calls, X-ray and labora-

tory expense reimbursement up to $50 and supplemental accident expense payments up to $300.

The Court will at once appreciate the tremendous social value which is attached to benefits of this sort. Men who, in the past, would have become public charges when misfortune struck are now being provided with complete hospital, medical and surgical care out of funds created through their own toil and sweat. They receive needed care and attention without the stigma of public charity and without drain on the taxpayer. Because they know that the cost will not come out of their meager savings, if any, they are encouraged to seek medical and hospital attention at an early stage of an illness or for an injury which, if unattended, could have serious consequences. In addition, hospitals and doctors have assurance that their bills will be paid promptly, thereby creating important savings in the over-all cost of hospital, surgical and medical care.

In order to make health and welfare funds feasible for the building and construction industry, it has been necessary (1) to provide that contributions be made directly to the funds by the employers rather than by the employees; (2) to look to the unions rather than to the individual employees for the necessary authorizations; (3) to provide that the individual employees shall have no interest in the contributions as distinguished from the benefits to be provided by the funds; and (4) to require that individual employees meet minimum work requirements in order to enjoy the benefit of the funds. In the absence

of these provisions, the funds would be faced with insurmountable problems of collection, endless litigation concerning the rights of employees who did not qualify for coverage and the insoluble problem of providing substantial benefits for men who did not earn sufficient contributions to pay for such benefits.

We submit that these necessary peculiarities of health and welfare funds in the building and construction industry should not be used as makeweight arguments to stultify and emasculate the clear obligation of the respondent surety to pay in full for all work or labor performed on the bonded projects. Both reason and equity demand that health and welfare contributions be held to be within the coverage of the bonds in suit.

As the Court pointed out in the *Achterman* case (App. C. to Pet. for Cert., p. xv), the health and welfare contributions which the individual contractors have agreed to pay as partial consideration for the services of the construction laborers are the life blood of the Fund. If these contributions were not paid, the Fund would quickly disappear and the substantial benefits described above would end. While the failure of a single contractor to make his contributions would have slight effect upon the Fund, an accumulation of such failures would threaten its destruction, and would most certainly deprive those men who worked for the delinquent contractors of the insurance coverage which they had earned by their labor.

We respectfully submit that, in the light of the foregoing, no stretching or "extending" of the letter

of the Miller Act is required to hold that petitioners, and the laborers for whom they are trustees, are entitled to the security of respondent's bonds. Contrary to the conclusion of the District Court (R. 26), the contributions sought to be recovered are directly related to work performed on the contractor's government projects. They came due solely because such work was furnished and their amount is measured exactly by the number of hours of work performed. Certainly it was the intent of Congress to protect the laborer as to every element of his compensation and the novelty of the health and welfare element should not preclude a holding that such element is just as much within the protection of the bond as the laborer's hourly wage.

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the case should be remanded to the District Court with the direction that a summary judgment be entered in favor of petitioners.

Dated, August 20, 1956.

GARDINER JOHNSON,
THOMAS E. STANTON, JR.,
CHARLES P. SCULLY,
Counsel for Petitioners.

JOHNSON & STANTON,
Of Counsel.

(Appendix A Follows.)

Appendix A

The provisions of the Miller Act (Act of August 24, 1935, c. 642, 74th Cong., 1st Sess., 49 Stat. 793, 40 U.S.C., Secs. 270a-270e) are as follows:

AN ACT requiring contracts for the construction, alteration, and repair of any public building or public work of the United States to be accompanied by a performance bond protecting the United States and by an additional bond for the protection of persons furnishing material and labor for the construction, alteration, or repair of said public buildings or public work.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress Assembled.

Section 1. (a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all

persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

Section 2. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expira-

tion of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District

Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit.

Section 3. The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents, execution, and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof.

Section 4. The term "person" and the masculine pronoun as used throughout this Act shall include all persons whether individuals, associations, copartnerships, or corporations.

Section 5. This Act shall take effect upon the expiration of sixty days after the date of its enactment, but shall not apply to any contract awarded pursuant to any invitation for bids issued on or before

the date it takes effect, or to any persons or bonds in respect of any such contract. The Act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works," approved August 13, 1894, as amended, is repealed, except that such Act shall remain in force with respect to contracts for which invitations for bids have been issued on or before the date this Act takes effect, and to persons or bonds in respect of such contracts.

In the Supreme Court
of the
United States

October Term, 1956

No. 43

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 48

UNITED STATES OF AMERICA for the Benefit and on Behalf of HARRY SHERMAN, CHAS. ROBINSON, RONALD D. WRIGHT, STUART SCOFIELD, LEE LALOR, WILLIAM AMES, ERNEST CLEMENTS, CARL LAWRENCE, GORDON POLLOCK and HAROLD SJOBERG, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California,
Petitioners,

vs.

DONALD G. CARTER, Individually; DONALD G. CARTER, Doing Business as Carter Construction Company, CARTER CONSTRUCTION COMPANY and HARTFORD ACCIDENT AND INDEMNITY CO.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF.

I. THE BASIC ISSUE—ANSWER TO THE ARGUMENT THAT RESPONDENT SURETY HAS FULFILLED THE EXPRESS CONDITION OF ITS BOND.

Respondents make the basic contention that since the contractor, respondent Carter Construction Com-

pany, paid the hourly wages of the laborers in full, "the express condition of the payment bond has been fulfilled and the requirements of the Miller Act satisfied" (Resp. Br., p. 6).

The express condition of the payment bond, however, imposes a broader obligation than that of merely paying hourly wages. The condition is that the contractor "promptly make payment to all persons supplying labor." This condition includes the obligation to pay hourly wages in full, but it also includes, we submit, the obligation to pay any other agreed consideration for the labor supplied.

It is undisputed in this case that the contractor's agreement to make contributions to the Laborers Fund was a part of the agreed consideration for the services of the laborers who worked on the bonded projects. Petitioners alleged that such was the fact (R. 7-8) and Respondents admitted that this allegation was true (R. 13).

The agreement that part of the consideration for the services of the individual laborers, amounting to 7½ cents per hour worked, would be paid to petitioners in trust for the laborers was negotiated on behalf of such laborers by the Laborers District Council. Under the provisions of the National Labor Relations Act, as interpreted by this Court, the Council was the exclusive bargaining agent of the laborers with broad authority to represent them in collective bargaining negotiations and to make contracts with employers on their behalf (*Ford Motor Co. v. Huffman* (1953) 345 U.S. 330, 337-343; *Aeronautical Lodge v.*

Campbell (1949) 337 U.S. 521, 526; *Wallace Corp. v. Labor Board* (1944), 323 U.S. 248, 255; *J. I. Case Co. v. Labor Board* (1944) 321 U.S. 332). The consideration that the Council offered to the contractors in return for their agreement to make payments to petitioners—and the *only* consideration that it had to offer—was the services of the men it represented and for whom it spoke. While the agreement was made with the Council, the legal effect of the agreement, as related to Carter Construction Company and the individual laborers who worked on Carter's projects, was the same as that of an agreement with identical terms between Carter and each of the laborers (Rest. of Agency, §292; 2 Am. Jur. 304, Agency, §388; *Baldwin v. Bank of Newberry* (1863), 68 U.S. 234, 241). Further, petitioners are not only trustees for the individual laborers; they are also designated by the Labor Management Relations Act as "representatives" of such laborers (Sec. 302; 29 U.S.C. Sec. 186; *United States v. Ryan* (1956), 350 U.S. 299, 305).

The arguments advanced by Respondents would require this Court to find that when the laborers agreed, through their Union Council, that 7½ cents per hour of the consideration for their services would be paid to petitioners as trustees for their benefit, and as their statutory representatives to receive such payments, they waived *pro tanto* their rights under the Miller Act. We respectfully urge upon the Court that no such waiver was intended and that, in view of the salutary purposes of the Miller Act, an involuntary and unintended waiver should not be found to have taken place.

It is of no significance, we submit, that "The obligation to pay the contributions into the . . . Fund did not arise under the contract between the United States and the contractor but was created by an agreement entered into between the contractor and a union independent of the contract with the United States" (Resp. Br., pp. 7-8). The obligation of the contractor to pay the hourly wage rates that were paid to the laborers arose out of the same collective bargaining agreement which imposed the obligation to make contributions to the Fund. It happens that these wage rates were recognized by the Federal government as the prevailing wage rates which, under the Davis-Bacon Act, the contractor was required to pay to the laborers, but this statutory command merely reinforced a contractual obligation which already existed.

We submit, further, that it is of no significance that, by virtue of the agreement with the Laborers District Council, the contributions payable to petitioners have certain characteristics, emphasized by Respondents, which distinguish them from hourly wages. These characteristics are (1) that the individual laborer is expressly foreclosed from any right to receive the contributions in lieu of benefits, (2) that he must work at least 400 hours in a six-month period for contributing employers in order to be entitled to insurance benefits, (3) that once eligible for insurance benefits, he remains eligible for a six-month period whether or not he continues working in the industry, (4) that contributions are made with respect to some laborers who never become eligible for benefits and

(5) that the individual laborer pays no income tax upon the amount of his employer's contributions.

The first four of these characteristics, as we pointed out in our opening brief (pp. 45-46), were deemed by the negotiating parties to be essential to the establishment of a workable health and welfare program for construction laborers. By adopting these provisions the parties were able to set up a sound program providing very substantial benefits for those laborers who identified themselves with the construction industry by working 20 weeks or more per year for employers contributing to the Fund. This established, operating program benefits all construction laborers in the bargaining unit, since the laborer who may not qualify in one work period has the continuing prospect of qualifying in succeeding periods by meeting the minimum work requirements. The agreement of the Laborers District Council to the provisions which made this program possible was well within its authority and discretion as the statutory representative of all the laborers in the bargaining unit (*Ford Motor Co. v. Huffman* (1953) 345 U.S. 330, 338, *supra; Steele v. Louisville & Nashville Railroad Co.* (1944) 323 U.S. 192, 203; *Coos Bay Lumber Company v. Local 7-116, International Woodworkers of America* (1955) 203 Ore. 342, 279 Pac. (2d) 508, 512, *reh'g den.*, 280 Pac. (2d) 412).

With regard to the fifth characteristic, Congress has declared that for the purpose of the Federal Income Tax "gross income" shall not include contributions by the employer to accident or health plans for

his employees (26 U.S.C. Sec. 106). It has likewise provided that such contributions shall not constitute "wages" as defined in the Federal Insurance Contributions Act (26 U.S.C. Sec. 3121(a)(2)) and in the Federal Unemployment Tax Act (26 U.S.C. Sec. 3306(b)(2)). The manner in which these provisions have been stated, however, makes clear that Congress considered that such contributions are remuneration for services and that in the absence of express exclusion they would have been "income" or "compensation" subject to tax within the broad scope of these Acts. The inference to be drawn from these provisions is, not that such contributions fall outside the concept of compensation for labor performed, but that they are so socially desirable and favored by Federal public policy that they should not be taxed.

It follows from the foregoing that since Carter Construction Company did not pay the contributions it had agreed to make into the Fund, it did not pay in full for the labor furnished by the individual laborers, and the condition of the payment bond has not been fulfilled.

II. REPLY TO THE AUTHORITIES CITED BY RESPONDENTS IN SUPPORT OF THEIR BASIC CONTENTION.

The first authority cited by respondents in the body of their argument, *MacEvoy Co. v. United States* (1944) 322 U.S. 102, has no pertinence to this case.

The obligation which petitioners seek to enforce is one incurred directly by the prime contractor, Carter,

to the individual laborers through their Union Council. The rate of the obligation was fixed by the same collective bargaining agreement that fixed the rates of the hourly wages to be paid to the laborers. The prime contractor and its surety had direct knowledge of the extent of their obligation from the prime contractor's own payrolls, and there is no issue in this case, as there was in the *MacEvoy Co.* case, of protecting the prime contractor or its surety against "remote and undeterminable liabilities" (322 U.S. 110).

Respondents' next citation, *In re Brassel* (D.N.Y. 1955) 135 Fed. Supp. 827, is one of a series of district court and bankruptcy referee decisions involving the question as to whether contributions to a health and welfare fund are "wages" within the meaning of that term as used in subsection a(2) of Section 64 of the Bankruptcy Act (11 U.S.C. Sec. 104a(2)). At least one of these decisions, *In the Matter of Sleep Products, Inc.* (D.N.Y. 1956) 141 F. Supp. 463, is pending on appeal before the United States Court of Appeals for the Second Circuit, and the question may ultimately reach this Court for decision. We do not concede the correctness of these lower court decisions, but it would seem sufficient for the purposes of this case to point out that the wording of Section 64a(2) of the Bankruptcy Act is more restrictive than that of the Miller Act and arguably, unlike the Miller Act, is subject to a rule of strict construction (*In the Matter of Sleep Products, Inc., supra,* p. 469). Further, the case of *In re Brassel* is factually distinguishable from this case, in that the benefits of the

welfare fund there involved were limited to union members whereas the benefits of the Laborers Fund are extended to every employee in the bargaining unit who qualifies by working 400 hours in a six month period for contributing employers, regardless of whether or not be is a member of the Laborers Union (R. 35).

The opinion of the California Attorney General reported at 22 Ops. Cal. Atty. Gen. 198, deals with an internal problem of the State of California relating to its own employees, and has no standing as an authority apart from this problem. The distinction drawn between "wages" or "compensation", on the one hand, and "conditions of employment," on the other, has no relevance to the issue in this case as to whether health and welfare contributions constitute payments due for labor within the meaning of the Miller Act.

In *City of Portland v. Heller* (1932) 139 Ore. 179, 9 Pac. (2d) 115, the court denied a recovery on the payment bond there involved because the plaintiff association had no contractual relationship with the employees who furnished services and had no basis for claiming as an equitable assignee of such employees. For the reasons stated in our opening brief (pp. 33-34), which have not been answered by respondents, petitioners in this case are entitled to claim as equitable assignees as well as trustees and statutory representatives of the laborers, and accordingly the *City of Portland* case supports our position rather than that of respondents.

United States ex rel. Southern G.-F. Company v. Landis & Young (W.D.La. 1935) 16 Fed. Supp. 832, *United States ex rel. New York Casualty Co. v. Standard Surety & Casualty Co. of New York* (S.D. N.Y. 1940) 32 F. Supp. 836, and other cases holding that premiums due for employers' liability and workmen's compensation insurance are not recoverable under a Miller Act bond, are clearly distinguishable from the case before this Court. The basic purpose of employers' liability and workmen's compensation laws is to shift the cost of industrial injuries from the workman and his dependents to the industry itself (*Baltimore & P. S. B. Co. v. Norton* (1932) 284 U.S. 408, 414), and most of these laws prohibit an employer from making or taking any deduction from the earnings of any employee either directly or indirectly to cover the whole or any part of his workmen's compensation obligation (Calif. Labor Code, Sec. 3751; 33 U.S.C. Sec. 915(a); *Mountain Timber Co. v. Washington* (1917) 243 U.S. 219, 246). In these circumstances the premium charged to an employer for workmen's compensation insurance could not, by any possibility, be considered a part of the consideration paid for the services of the insured employees and the insurance carrier could have no claim to status as an assignee of such employees.

Bill Curphy Co. v. Elliott (5th C.A. 1953) 207 F. (2d) 103 and *United States for use of Dorfman v. Standard Surety and Casualty Co. of New York* (S.D. N.Y. 1941) 37 F. Supp. 323, are not relevant because plaintiffs do not claim as creditors who advanced

money to Carter to pay for the services of the laborers. They claim as trustees for the laborers who performed the services and in the right of such laborers, who have not been paid in full for their services.

United States for the use of Gibson v. Harman (4th C.A. 1951) 192 F. (2d) 999, relies on and follows the cases, considered *supra,* which hold that employers' liability and workmen's compensation insurance premiums are not recoverable under a Miller Act bond. The case is distinguishable on the same basis as the cases which it follows, and on the further ground that an uninsured workmen's compensation award is a too "remote and undeterminable" liability to be imposed upon the prime contractor under the Miller Act (see *MacEvoy Co. v. United States* (1944), 322 U.S. 102, 110, *supra*).

The remaining cases cited by respondents in support of their basic contention that the condition of the payment bond has been fulfilled (*U. S. Fidelity & Guaranty Co. v. United States* (10th C.A. 1952) 201 F. (2d) 118; *United States v. Crosland Construction Company* (4th C.A. 1954) 217 F. (2d) 275; *United States v. Zschack Construction Co.* (10th C.A. 1954) 209 F. (2d) 347; *Westover v. William Simpson Construction Co.* (9th C.A. 1954) 209 F. (2d) 908; *Fireman's Fund Indemnity Co. v. United States* (9th C.A. 1954) 210 F. (2d) 472, and *General Casualty Co. of America v. United States* (5th C.A. 1953) 205 F. (2d) 753) are all cases holding that the United States cannot recover on a Miller Act payment bond for federal income or social security

taxes withheld by the contractor from the wages of his employees and not paid over to the Government. These cases were decided on the theory, clearly stated in the *United States Fidelity & Guaranty Co.* case (201 F. (2d) 120):

> "that when an employer withholds the tax from an employee's wage and pays him the balance the employee has been paid in full. He has received his full wage. Part of it has gone to pay his withholding tax and the balance he has. **The employer has discharged his contractual obligation to pay the full wage.*** Thereafter there remains only his liability for the tax he has collected. That is a tax liability for which he alone is liable to the Government as for any other taxes which he may owe."

In the case now before this Court, there can be no contention that the contractor, Carter Construction Company, has discharged its contractual obligation in full. As part of a single collective bargaining agreement, Carter agreed not only to pay the hourly wages of his laborers in full but also to pay contributions of 7½ cents for each hour they worked to petitioners on their behalf and for their benefit. Petitioners have brought this action to enforce the second aspect of this contractual obligation and the income tax withholding cases, insofar as they have any pertinence to this proceeding, support petitioners' right to such enforcement.

In the income tax withholding cases the courts have emphasized that the Government, in suing the con-

*Emphasis added.

tractor and his surety for the amount withheld from the wages of the employees, is seeking to enforce a statutory obligation owed by the contractor alone directly to the Government. The point is made in these cases that the employees have been fully discharged of their tax obligation and that the Government is not suing on their behalf or for their benefit. The courts have expressly rejected the Government's contention that "'Under the circumstances the United States succeeds by operation of law to the rights of the wage earners to the amounts deducted and withheld from wages as effectively as if it had taken a written assignment from the wage earners covering the withheld portion of their wages'" (201 F. (2d) 120).

Petitioners, on the other hand, have alleged that they are "duly authorized to sue and collect [the sums in suit] on behalf of and for the benefit of [the] laborers" (R. 10) and respondents have admitted that this allegation is true (R. 13). Accordingly since petitioners *are* suing to enforce an undischarged contractual obligation, as trustees for and representatives of the laborers who performed the services which created the obligation, the decisions in the income tax withholding cases are authority *for* rather than against petitioners' right to recover in this action.

III. ANSWER TO THE ARGUMENT THAT PETITIONERS' CLAIM CANNOT BE BROUGHT WITHIN THE LETTER OF THE MILLER ACT BECAUSE PETITIONERS DID NOT FURNISH THE LABOR AND THE AMOUNT CLAIMED IS NOT JUSTLY DUE TO THE LABORERS WHO DID.

Petitioners do not dispute that they did not furnish labor to the bonded projects and that, under the applicable collective bargaining agreement and the trust agreement "Exhibit C" (R. 21), they are the ones who have been expressly given the power to demand and enforce the prompt payment of contributions to the Fund (R. 21, Exh. C, p. 8).

Carter's obligation to make payments into the Fund, however, was an obligation imposed primarily by the collective bargaining agreement rather than by the trust agreement (R. 7). The collective bargaining agreement was negotiated by the Laborers District Council as agent for the individual laborers, and accordingly, under established principles of agency, the obligations imposed by that agreement, including the obligation to make payments into the Fund, run directly to the individual laborers (Rest. of Agency, § 292 and other authorities cited *supra*, p. .....). For the reasons given in our opening brief (pp. 45-46), the power to enforce the obligation to make payments to the Fund has been placed in the hands of petitioners as trustees for the laborers and as their statutory representatives, but the basic obligation itself remains an obligation owed to and "due" the laborers for the labor they have furnished.

Petitioners do not contend that the words of the Miller Act cover their claim with precision, but they

do contend that the words are as applicable to them as to assignees of the laborers and that their claim is clearly within the spirit and intent of the Act.

IV. ANSWER TO THE ARGUMENT THAT LIQUIDATED DAMAGES AND ATTORNEYS' FEES ARE NOT RECOVERABLE AGAINST RESPONDENT SURETY.

Respondents' argument that liquidated damages and attorneys' fees are not recoverable in this action is based upon a misapprehension of fact. They argue that these items, "not being an integral part of the obligation to pay for labor performed, cannot be covered by the bond" (Br. p. 32).

As we pointed out at pages 39 to 41 of our opening brief, however, the agreement of Carter to pay liquidated damages and attorneys' fees *was* an integral part of its obligation to pay the portion of the agreed consideration for the services of its laborers allocated to health and welfare contributions. The right to recover these items being established by contract, it is unnecessary for petitioners to point to any express statutory provision for their recovery.

V. CONCLUSION.

For the reasons we have given above and in our opening brief, we respectfully submit that respondents have *not* fulfilled the condition of their bond. They have not paid in full for the labor that was supplied to respondent contractor, and the manifest intent of

Congress in enacting the Miller Act will not be carried out unless petitioners are permitted to recover in this action.

Dated, November 13, 1956.

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JOHNSON & STANTON,
Of Counsel.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1955

No. [redacted] 48

UNITED STATES OF AMERICA for the Benefit and on Behalf of HARRY SHERMAN, CHAS. ROBINSON, RONALD D. WRIGHT, STUART SCOFIELD, LEE LAIOR, WILLIAM AMES, ERNEST CLEMENTS, CARL LAWRENCE, GORDON POLLOCK and HAROLD SJOBERG, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California,
Petitioners,

vs.

DONALD G. CARTER, Individually; DONALD G. CARTER, Doing Business as Carter Construction Company, CARTER CONSTRUCTION COMPANY and HARTFORD ACCIDENT AND INDEMNITY CO.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 752

UNITED STATES OF AMERICA for the Benefit and on Behalf of HARRY SHERMAN, CHAS. ROBINSON, RONALD D. WRIGHT, STUART SCOFIELD, LEE LALOR, WILLIAM AMES, ERNEST CLEMENTS, CARL LAWRENCE, GORDON POLLOCK and HAROLD SJOBERG, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California,
Petitioners,

vs.

DONALD G. CARTER, Individually; DONALD G. CARTER, Doing Business as Carter Construction Company, CARTER CONSTRUCTION COMPANY and HARTFORD ACCIDENT AND INDEMNITY CO.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondent, Hartford Accident and Indemnity Co., prays for an order denying the petition for a writ of certiorari on file herein.

OPINION BELOW.

The opinion of the Honorable Louis Goodman, United States District Judge, is set forth as Appendix A hereto.

QUESTIONS PRESENTED.

Both in the Trial Court and upon appeal to the United States Court of Appeals for the Ninth Circuit, petitioners sought to recover liquidated damages and attorneys' fees as provided for in the trust agreement between themselves and the contractor. Neither Court found it necessary to determine those issues. If this Honorable Court makes its order granting the petition, the following questions will be presented for review:

1. Where the principal on a Miller Act bond has covenanted that he will make monthly payments into a Health and Welfare Trust Fund, upon his default is his surety liable therefor?

2. Where the principal on a Miller Act bond has covenanted that he will pay liquidated damages in the event of his failure to make monthly payments into a Health and Welfare Trust Fund, upon his default may the Trustees recover said liquidated damages from his surety?

3. Where the principal on a Miller Act bond has covenanted that he will pay attorneys' fees in the event of his failure to make monthly payments into a Health and Welfare Trust Fund, upon his default may the Trustees recover said attorneys' fees from his surety?

STATEMENT OF THE CASE.

At the time that Donald G. Carter became a bankrupt (R. 41), he had paid all of the wages required by him to be paid under his contract with the United States in full and without deduction of any kind (R. 13-14). Article II, Section 3 of the Trust Agreement provides that the unpaid contributions which the petitioners herein seek to recover shall not be deemed wages, and that the employee-beneficiary shall not be entitled to receive any part thereof (Exh. C, R. 21). Section 4 of the same Article provides that the employee-beneficiary shall have no title or interest to the Fund other than provided in the Trust Agreement, and Section 2 of Article VIII provides that no employee-beneficiary shall have a right to any benefits under the Health and Welfare Plan except as specified in the policies or contracts procured thereunder. The Fund provides benefits for the families of workers as well as the workers themselves (Petitioners' Brief, p. 4). A worker need not work on any specific project to qualify for benefits, and may enjoy them even though he is no longer working (R. 40).

The issues presented to the Courts below had not before been decided by a Federal Court. A United States District Court, in an Opinion published on January 23, 1956, has decided that contributions to a Union welfare fund are not wages due to workmen within the meaning of 11 U.S.C.A. 104(a)(2), and are therefore not entitled to prior payment out of the bankrupt's estate.*

In re Brassel, U.S.D.C. N.D.N.Y., 135 F. S pp. 827.

THE PETITION FOR CERTIORARI SHOULD BE DENIED.

The petitioners first argue that the writ should issue because of the increasing importance of welfare funds to the individual laborer. This may be conceded; but "Certiorari is granted only in cases involving principles the settlement of which is of importance to the public and distinguished from that of the parties, * * *" (*National Labor Relations Board v. Pittsburg Steamship Company,* 340 U.S. 498, 95 L. ed. 479).

As their next argument, the petitioners state that it is important to the United States that their petition be granted for the reason that if contractors refuse or fail to make contributions to the welfare funds, their workers will strike, resulting in delays on Federal construction projects. The answer is that the Miller Act requires that contractors also furnish a performance bond; Carter did so (R. 13-14, Exh. A).

The petitioners finally argue that the Circuit Court, by its decision, has given a literal interpretation to the Miller Act, whereas this Court has heretofore held that said Act shall be liberally construed; and, whereas the Circuit Court held that the petitioners herein were not persons who had furnished labor and hence could not bring an action under the Miller Act, this Court has heretofore held that assignees of those who have furnished labor may bring actions on Miller Act bonds. Both arguments proceed from the wholly erroneous premise that the Circuit Court's "Decision was grounded solely and squarely upon the fact that

if the Miller Act is read and applied literally, 'recovery on a Miller Act bond is limited to persons who have "furnished labor or material in the prosecution of the work provided for in the contract" ' ". (Petitioner's Brief, p. 14). As clearly appears from its opinion, the Circuit Court held that recovery could be had only by a person who had furnished labor and material and that said recovery was necessarily limited to that which was "justly due". After pointing out that the contractors and the union had specifically agreed that the contributions were not to be considered wages and that the employees of the former were to have no interest in any part thereof, the Court said, "*Even if we were to assume that they were authorized to maintain the action for and on behalf of persons who furnished labor, recovery could not be had because the delinquent payments sought to be recovered are not 'sums justly due' the persons who furnished the labor.*" (Petitioner's Brief, Appendix A). It is therefore abundantly clear that the true basis for the Circuit Court's opinion was that there was nothing due the workers which they or their assigns could recover.

The Miller Act and its predecessor, the Heard Act, have been before this Court many times. In *Brogan v. National Surety Company* (246 U.S. 257, 38 S.C. 250, 62 L. ed. 703), the conditions essential to recovery on the bond were said to be that the labor or materials must be "necessary to and wholly consumed in the prosecution of the work provided for in the contract and bond". Here, the undisputed facts are that the

workers were paid in full for the necessary labor which they furnished and which was consumed in the prosecution of the work. They had no interest in the contributions which were to be made by Carter, and those contributions bore no relationship whatsoever to the prosecution of the work which Carter undertook to perform for the United States. Nothing was due his workers and they had no claim which they could prosecute or assign to others. Such was the holding of the United States District Court and such was the judgment of the United States Court of Appeals for the Ninth Circuit.

As this Court said in *MacEvoy Company v. The United States* (322 U.S. 103, 88 L. ed. 1163, 64 S.C. 890),

> "The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate Congressional intent to protect those whose labor and materials go into public projects, (citing cases) *but such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds.*" (Emphasis added.)

CONCLUSION.

The decision of the Court of Appeals does not conflict with the decisions of this Honorable Court. The undisputed facts establish that nothing was due Carter's workers which could ground a claim against his surety. The Court below rightly decided the issue

under the applicable decisions of this Honorable Court.

Dated, San Francisco, California,
April 4, 1956.

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(Appendix Follows.)

[Title of Court and Cause.]

ORDER RE MOTIONS FOR SUMMARY JUDGMENT.

This is an action by the use-plaintiffs, under the Miller Act, 40 USC §270a, to recover from Carter Construction Company, (now defunct) and the surety on its bond, employee health and welfare contributions, which a collective bargaining agreement in the construction trade required the construction company to make to the Union and which it failed to pay.

Both sides have moved for summary judgment.

It is conceded that no issue of fact is tendered.

In my opinion, the use-plaintiffs, relying, as they do, upon the doctrine favoring a liberal construction of the Miller Act, here ask the statute to be stretched far beyond the limits of its objectives and purposes. Neither the language nor the purpose of the Miller Act permits the Act to be applied as plaintiffs ask.

40 USC §270a was purposed to protect those supplying labor and materials on government jobs substantially in the same way as they are protected under state mechanics' lien laws. §270a specifically provides that the bond required to be provided by contractors is "for the protection of all persons supplying labor and material in the prosecution of the work provided for in such contract."

It is agreed here that the wages of all laborers on the specific government project, with which we

are concerned, were paid in full. The payments here sought to be recovered were payments which the Construction Company, along with all other employers, was obligated to pay to the Union as a health and welfare fund for Union members, under a collective bargaining agreement. They had nothing whatever to do with this specific government job, or, in fact, with any designated job or work.

True, the amount of contribution required of each employer was calculated at so much per hour of the time worked by employees. But that was just a mere method of calculation, nothing more. It applied to all employees for all jobs. The fund itself was a device to maintain harmonious relations between employer and Union. No part of the contributions sought to be recovered had the slightest relationship to or concerned the "prosecution of the work provided for in said contract."

No authority has been cited nor have we been able to find any, which would serve as precedent for extending the reach of the Miller Act to the radical extent sought.

Defendants' motion for summary judgment is granted. The contra motion of plaintiffs is denied.

Dated, January 21, 1955.

/s/ Louis Goodman,
United States District Judge.

[Endorsed]: Filed January 21, 1955.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1955

No. [redacted] 48

UNITED STATES OF AMERICA for the Benefit and on Behalf of HARRY SHERMAN, CHAS. ROBINSON, RONALD D. WRIGHT, STUART SCOFIELD, LEE LALOR, WILLIAM AMES, ERNEST CLEMENTS, CARL LAWRENCE, GORDON POLLOCK and HAROLD SJOBERG, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California,
Petitioners,

vs.

DONALD G. CARTER, Individually; DONALD G. CARTER, Doing Business as Carter Construction Company, CARTER CONSTRUCTION COMPANY and HARTFORD ACCIDENT AND INDEMNITY CO.,
Respondents.

RESPONDENTS' BRIEF.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 752

UNITED STATES OF AMERICA for the Benefit and on Behalf of HARRY SHERMAN, CHAS. ROBINSON, RONALD D. WRIGHT, STUART SCOFIELD, LEE LALOR, WILLIAM AMES, ERNEST CLEMENTS, CARL LAWRENCE, GORDON POLLOCK and HAROLD SJOBERG, as Trustees of the Laborers Health and Welfare Trust Fund for Northern California,
Petitioners,

vs.

DONALD G. CARTER, Individually; DONALD G. CARTER, Doing Business as Carter Construction Company, CARTER CONSTRUCTION COMPANY and HARTFORD ACCIDENT AND INDEMNITY CO.,
Respondents.

RESPONDENTS' BRIEF.

I.

QUESTION PRESENTED.

Should the surety on a payment bond, given pursuant to the Miller Act (40 U.S.C.A. 270a *et seq.*),

the condition of which is that the contractor promptly pay all persons supplying labor in the prosecution of the work provided in a contract between the contractor and the United States, be held liable to the trustees of a Health and Welfare Fund for unpaid employer-contributions, liquidated damages and attorneys' fees provided for in a Trust Agreement entered into by the contractor and a union independent of the construction contract with the United States, notwithstanding the fact that the contractor has paid all persons performing labor all wages provided for in the construction contract in full, without deduction?

II.

STATEMENT OF CASE.

In November 1952 Donald G. Carter, doing business as Carter Construction Company (hereinafter referred to as Carter), as contractor, entered into two contracts in writing with the United States of America wherein he agreed to furnish materials and perform work for the construction and completion of the Flyaway Kit Storage Building at Travis Air Force Base in Solano County and the Navigation Trainer Building at Mather Field in Sacramento County, California. (Par. V, Amended Complaint, R. 5, 6.)

Each of the contracts provided in Paragraph 14 that the contractor shall pay "all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week,

and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by applicable regulations prescribed by the Secretary of Labor), the full amounts accrued at time of payment computed at wage rates not less than those stated in the specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or sub-contractor, and the laborers and mechanics . . ." (Admission of Facts, Par. 2, R. 13.)

As required by the provisions of the Miller Act (40 U.S.C.A. 270a-270d) Carter furnished both a performance bond and a payment bond on which the respondent Hartford Accident and Indemnity Company is surety. (Exhibits A and B, R. 15-19.)

The condition of the payment bond is that "if the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract . . . then this obligation to be void; otherwise to remain in force and virtue." (R. 19.)

It is admitted that the defendant Carter paid to his laborers all of the wages required by him to be paid under his contracts with the United States in full and without deduction. (Par. 3, Admission of Facts, R. 13, 14.)

The defendant Carter then became bankrupt. (R. 41.)

None of the plaintiffs in this action were employees of the contractor Carter. The plaintiffs herein are

suing as the trustees of a Health and Welfare Trust Fund (hereinafter referred to as the Fund) (Par. I, Amended Complaint, R. 4) which was created after the building contract was entered into by a trust agreement dated March 4, 1953 (Par. IX, Amended Complaint, R. 7) for contributions to said fund which the contractor Carter failed to make for the months of February, March and April, 1953. (Par. XI, Amended Complaint, R. 9.)

The trust agreement specifically provides that "contributions to the Fund shall not constitute or be deemed to be wages due to the employees with respect to whose work such payments are made, and no employee shall be entitled to receive any part of the contributions made or required to be made to the Fund in lieu of the benefits provided by the Health and Welfare Plan. (Art. II, Sec. 3, p. 3, Trust Agreement, R. 21.)

The trust agreement further specifically provides that no beneficiary of the plan shall have any rights, title or interest in the Fund other than as specifically provided therein. (Art. II, Sec. 4, pp. 3-4, Trust Agreement, R. 21) and further provides that none of the contributions to the Fund are in any manner liable for any debts, contracts, or liabilities of any employee nor is any part of the Fund or any benefits payable in accordance with the Health and Welfare Plan subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge by any person. (Art. II, Sec. 4, p. 4, Trust Agreement.)

Power is given to the board of trustees of the trust agreement to enforce prompt payment of contributions. (Art. IV, Sec. 3, p. 8, Trust Agreement, R. 21.) However, no employee has any right or claim to benefits under the Health and Welfare Plan except as specified in the policies. (Art. VIII, Sec. 2, p. 17, Trust Agreement, R. 21.)

An employee in order to acquire any right to benefits under the Fund is required to work 400 hours in a six-month period. Once he has worked 400 hours, the employee receives the insurance protection for the succeeding six-month period whether or not he continues to work in the industry. However, if he ceases working in the industry, he loses his eligibility for benefits when the six-month eligibility period is up. (R. 40.)

The trustees are required to utilize the contributions to purchase insurance policies (Art. IV, Sec. 4, p. 8, Trust Agreement, R. 21), and the employees have no right or claim to benefits under the plan except as provided in the insurance policies so procured. (Art. VIII, Sec. 2, p. 17, Trust Agreement, R. 21.)

The measure of eligibility of an employee is whether or not he works 400 hours in a given six-month period—not that his employer make the contributions required by the trust agreement. (R. 42, 43 and 44, Opening Brief of Petitioners, pp. 13, 14.)

It is also to be noted that the contributions are made to the Fund by the employer whether or not the employee subsequently becomes eligible for any benefits. (Par. 1, Recitals, p. 1, Trust Agreement, R. 21.)

The employee makes no contribution to the Fund (R. 49) nor does he pay any income tax on the amount of the employer's contribution. (R. 51.)

It is conceded that the trustees are not suing for any benefits on behalf of the employees. (R. 42.)

III.

SUMMARY OF ARGUMENT.

Because all employees furnishing labor in the prosecution of the work provided for in the contract have been paid their wages in full, without deduction, the condition of the payment bond has been fulfilled, the requirements of the Miller Act are satisfied and the amounts claimed by the trustees of the Health and Welfare Fund for unpaid contributions of the employer, for liquidated damages and for attorneys' fees, cannot be recovered from the surety on the payment bond.

A. There are at least three basic reasons why the surety is not liable to the trustees for the delinquent employer-contributions:

1. The contractor having paid all laborers in full without deduction, the express condition of the payment bond has been fulfilled and requirements of the Miller Act satisfied.

40 U.S.C.A. 270a and 270b.

Clifford F. MacEvoy Co. v. U. S. for the use and benefit of Calvin Tomkins Co., (1943), 322 U.S. 102, 88 L.ed. 1163, 64 S.Ct. 890.

2. The unpaid employer-contributions which are the subject of this suit do not constitute wages.

In Re Brassel (1955), 135 Fed. Supp. 827;

22 Opinions of Attorney General of California, 198;

Adams v. San Francisco (1949), 94 Cal. App. 2d 586;

City of Portland ex rel National Hospital Association v. Heller, 139 Oregon 179, 9 Pac. 2d 115;

U. S. ex rel Southern G.-F. Co. v. Landis & Young, 16 Fed. Supp. 832;

U. S. ex rel New York Casualty Co. v. Standard Surety & Casualty Co. of New York (1940), 32 Fed. Supp. 836;

Bill Curphy Co. v. Elliott (1953), 207 F. 2d 103;

U. S. for use of Dorfman v. Standard Surety & Casualty Co. of New York (1941), 37 Fed. Supp. 323;

U. S. for use of Gibson v. Harman (1951), 192 F. 2d 999.

(a) Even assuming that the employer-contributions were considered to be wages, since the contractor has paid his laborers in full, the surety is not liable for such unpaid contributions. The obligation to pay the contributions into the Health and Welfare Fund did not arise under the contract between the United States and the contractor but was created by an agree-

ment entered into between the contractor and a union independent of the contract with the United States.

U. S. Fidelity & Guaranty Company v. United States (1952), 201 Fed. 2d 118;

United States v. Crosland Construction Company (1954), (4th Circuit), 217 F. 2d 275;

United States v. Zschach Construction Co. (10th Circuit), 209 F. 2d 347;

Westover v. William Simpson Construction Co. (9th Circuit), 209 F. 2d 908;

Fireman's Fund Indemnity Co. v. U. S. (9th Circuit), 210 F. 2d 472;

General Casualty Co. of America v. U. S. (5th Circuit), 205 F. 2d 753;

Central Bank v. U. S. (1952), 345 U.S. 639, 73 S.Ct. 917, 97 L.ed. 1312;

Bernard v. Indemnity Insurance Co. of North America (Superior Court, State of California, Los Angeles County, No. 654738, Attached as Appendix A).

3. The plaintiffs were not "persons supplying labor . . . in the prosecution of the work provided for" in the contract between Carter and the United States and are therefore not persons entitled to recovery under the Act or to protection under the payment bond.

Bill Curphy Co. v. Elliott (1953), 207 F. 2d 103;

U. S. for use of Dorfman v. Standard Surety and Casualty Co. of New York (1941), 37 Fed. Supp. 323;

Clifford F. MacEvoy Co. v. United States, for the use and benefit of Calvin Tomkins Co., 322 U.S. 102, 88 L.ed. 1163, 64 S.Ct. 890;

U. S. ex rel Southern G.-F. Co. v. Landis & Young, 16 Fed. Supp. 832.

B. The surety is not liable for either attorneys' fees or liquidated damages because:

1. Liability of the contractor, if any, for said damages and attorneys' fees arises by virtue of an agreement with the union independent of his contract with the United States.

2. In any event, a surety under the Miller Act is not liable for a claim for damages.

U. S. for use of Edward E. Morgan Co., Inc. v. Maryland Casualty Co. (1945), 147 F. 2d 423;

U. S. for use of Gibson v. Harman, 192 F. 2d 999.

3. Attorneys' fees are not recoverable under the Miller Act in the absence of a State statute requiring such payment.

U. S. for use of Watsabaugh & Co. v. Seaboard Surety Company, 26 Fed. Supp. 681.

IV.

ARGUMENT.

A. THE SURETY IS NOT LIABLE FOR EMPLOYER-CONTRIBUTIONS TO HEALTH AND WELFARE FUND.

1. Since all persons supplying labor in the prosecution of the work provided for in the contract have been paid their wages in full, the condition of the payment bond has been fulfilled, the requirements of the Miller Act are satisfied and no liability rests with the surety to pay the amounts claimed by the trustees of the welfare fund for unpaid contributions of the employer.

The measure of the contractual obligation of the surety is set forth in the Bond as follows: ". . . if the principal shall promptly make payment to all persons supplying labor . . . in the prosecution of the work provided for in said contract . . . then this obligation to be void . . ." (R. 19.)

This is in accordance with the provisions of Section 1 of the Miller Act requiring a payment bond "for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person" (40 U.S.C.A. 270a (2)), and which Act provides that "every person who has furnished labor . . . in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him . . . for which such claim is made, shall have the right to sue on such payment bond for the amount, or balance thereof, unpaid at the time of institution of such suit and to prosecute

said action to final execution and judgment for the sum or sums justly due him . . ." (40 U.S.C.A. 270b.)

It has been stipulated that all laborers have been paid their wages in full without deduction or rebate. (R. 14.)

Therefore, the condition of the payment bond having been fulfilled, it should be clear that no further liability exists on the part of the surety, unless the conditions expressed both in the Miller Act and the bond lack meaning or force.

In the case of *Clifford F. MacEvoy Co. v. U. S.*, for use and benefit of Calvin Tomkins Co., 322 U.S. 102, 88 L.ed. 1163, 64 Sup. Ct. 890, the Court, in holding that a person supplying material to a materialman of a Government contractor (as distinguished from a sub-contractor), and to whom an unpaid balance is due from the materialman, cannot recover on the payment bond executed by the contractor, stated that:

> "The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and material goes into public projects. (Citation of Cases.) But such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds."

2. The employer-contributions to the Health and Welfare Fund did not constitute "wages".

A. Even had said contributions been considered as wages, the surety would not be liable to the trustees of the Fund for said contributions because the contractor had paid the laborers in full.

The petitioners have made the contention that the employer-contributions were part of the compensation of the laborers which remains unpaid. (Pet. Brief, pp. 17-27.)

Such contention, of course, is directly contrary to the express provisions of the agreement establishing the Fund which specifically provides that such contributions are not to be deemed wages and which effectively eliminates any possibility that the individual employee has any interest in the contributions. (R. 21.)

A similar contention was made in the case of *In re Brassel* (1955 D.C. N.Y.), 135 Fed. Supp. 827, wherein the trustees of a welfare fund claimed a priority status for contributions to their fund which had not been paid by the bankrupt. The trustees contended that the unpaid contributions were entitled to priority by reason of Section 64, Subpar. a(2) of the Bankruptcy Act, 11 U.S.C.A., 104 Sub. a(2), which grants priority to wages not exceeding $600.00 to each claimant earned within three months before the date of the commencement of the proceedings, due to workmen.

At page 830 the Court stated:

> "The ultimate contention here, however, is one of priority. Liberality of construction of the term 'wages' does not justify a nullification of the language of the statute which grants priority only

to 'wages . . . due to workmen'. The employer's contribution here is never due to the employee. He may not enforce the employer's liability therefor. The employee never had an individual or assignable proprietary interest in the contribution or to the fund of which the contribution became a part . . ."

In the *Brassel* case the Court noted that the contributions are not subject to income or withholding taxes (which is the situation in the instant case. R. 51); that the contribution bears no relation to the wages of the employee except insofar as the wages are part of the formula by which the contribution is measured and that any other yardstick could have been used (which is the situation in the present case where the contributions were based on the hours worked (Recitals, subpar. 1, p. 1 of the Trust Agreement, R. 21)) and that the "ultimate benefit to the individual workman is dependent upon such union membership rather than upon his employment or by the contribution made by his employer."

The entitlement to benefits in the present case is also entirely unrelated to the relationship of employer and employee but rather upon eligibility established through working 400 hours during a six-month period. (R. 40, 42-44.)

Despite the elaborate arguments of petitioners, the undisputed fact remains that the laborers had no interest in the contributions which the contractor was to make pursuant to the separate agreement establishing the trust fund and the contributions bore no rela-

tionship whatsoever to the prosecution of the work which the contractor undertook to perform for the United States.

Nothing remains due the laborers and they have no claim which they can prosecute or assign to others.

The argument that until the contributions have been made the laborers have not been paid in full for their labor (Petitioner's Opening Brief, pp. 17-28) is to disregard the plain language of the case above cited, and the terms of the trust agreement.

As was pointed out previously and conceded by the petitioners, the trust agreement itself provides that the contributions shall not constitute nor be deemed to be wages. (Sec. III, Art. 2, Trust Agreement, R. 21.)

The petitioners cannot avoid the plain fact that the employees have been paid in full according to the contract of Carter with the United States and any claims on the part of the trust arise independently of said contract.

Petitioners state that at the time the master labor agreements were negotiated, it was impossible to grant wage increases because of federal wage controls and the governing policies and regulations of the Construction Industry Stabilization Commission indicated that any increases would not be approved. (Petitioners' Brief, p. 18.)

The petitioners admit that of equal importance was the fact that the casual nature of employment in the building and construction industry made direct

employer contribution *unfettered by possible* claims of *individual workmen* a practical necessity. (Petitioners' Brief, p. 18.)"

Furthermore, petitioners admit that it was doubtful whether deductions for payments for Health and Welfare Funds could have been approved because of the provisions of the Davis-Bacon Act, 46 Stat. 1494; 40 U.S.C. Secs. 276a-7, prohibiting deductions from wages on federal public jobs. (Petitioners' Brief, p. 19.) There were also apparently problems under the rules of the Wage and Hour Administration and the California Labor Code, Sec. 204, and California Insurance Code, Secs. 10202-8 and 10270-5.

From the foregoing the petitioners argue that the employer-contributions were considered in the minds of the parties to the agreement to be part of the compensation for the services of the employees.

Far from establishing such meaning, the facts set forth by petitioners as constituting the reasons for the manner in which the contributions were treated in the agreement seem clearly to establish that said contributions were not compensation of the employees. To contend that the parties to the trust agreement intended something other than what they expressed in plain language is to admit the attempt to evade the statutory restrictions by a subterfuge.

In any event, the background set forth by petitioners is immaterial and irrelevant. The trust agreement speaks for itself regardless of the motives which directed the form in which it was finally executed.

The case of *Coos Bay Lumber Co. v. Local 7-116* (1955), 203 Oregon 234, 279 Pac. 2d 508, is not in point. The question in that case was whether or not federal or Oregon law authorized the union through collective bargaining to commit the wages of the employees which it represented to the financing of employee group insurance programs. The validity or invalidity of such agreement is not in issue here and the question has no relevancy as to whether or not the trustees of a welfare fund can recover unpaid contributions from a Miller Act surety.

The Attorney General of the State of California has expressed his views concerning the nature of contributions identical to those at bar. In 22 Opinions of the Attorney General, 198, he distinguished "between pay and compensation on the one hand and the conditions of employment on the other" and concluded that payments such as these fall within the latter category. We quote from his opinion, beginning at page 199:

> "The agreement covering the welfare plan usually, although not universally, stipulates that the money paid by the employer into the fund for each hour worked by employees covered by the contract is not wages. It is the general understanding that welfare fund payments are not paid as wages to the employees covered by the plan.
>
> "A distinction has been drawn between pay and compensation on the one hand and the conditions of employment on the other. In *Adams v. San Francisco* (1949), 94 Cal. App. 2d 586, this distinction became important under the San Fran-

cisco charter provisions. In that case sick and disability leaves were characterized as phases of working conditions, but holiday pay, overtime pay, and vacation pay were said to be related to compensation or wages. The court said, at page 596: 'There are two goals to be obtained by the employer and employee in the promotion of the employee's welfare, namely, the fostering of better working conditions for the employee and the opportunity for profitable employment. The aims may be far apart or closely interwoven. The means to obtain the end converge or divert.'"

and at page 200:

"Aside from this, by their very nature such payments and benefits do not appear to be wages. The employee does not receive the money from the employer. The benefits are not a tangible asset given to the employee but are received by him only if he meets certain eligibility conditions set up in the welfare plan. Historically, housing, meals, bonuses, and the like have been considered to be compensation, but prepaid medical, accident, disability, and other like benefits have not been considered wages."

In *City of Portland ex rel. National Hospital Association v. Heller,* 9 Pac. 2d 115, 139 Oregon 179, the contractor contracted with the plaintiff to pay for medical services to be rendered by the latter to the former's employees, the consideration therefor to be based upon the number of employees and the days worked by each, said consideration to be deducted from the wages due. The plaintiff brought its action

against the contractor and the latter's surety for a balance due it for such services, and recovered judgment. The Supreme Court of Oregon reversed as to the surety, saying:

> "It is admitted that the service rendered by the association is not 'labor or material' furnished under the contract of the contractor with the City of Portland for which the surety is bound",

and:

> "It makes little difference whether we treat this case as an action at law or as a suit in equity; in either event, there is no evidence on which to base a finding and judgment against the surety."

In *United States ex rel. Southern G.-F. Company v. Landis & Young,* 16 Fed. Supp. 832, the American Employers Insurance Company, as intervenor, sought to recover premiums upon a policy of employers liability insurance, contending that it had furnished labor in the form of medical attention, medicines and hospital services. In a carefully considered and well reasoned opinion, the Court denied the claim, saying in part:

> "It is not contended that any materials other than medicines and hospital treatment, were actually furnished by this intervenor, and if it is to recover, the same must be upon the theory that the amount claimed was for labor furnished in the prosecution of the work. Payment of hospital and doctor bills could only indirectly affect the progress of the work by restoring the laborer to a condition which would enable him to subsequently return to the job."

To the same effect is *U. S. ex rel. New York Casualty Co. v. Standard Surety and Casualty Co. of New York* (1940), 32 Fed. Supp. 836, wherein the Court in considering whether or not the surety was liable for unpaid insurance premiums for workmen's compensation and employer's liability policies stated "I think it is too plain for argument that insurance premiums on workmen's compensation and employer's liability policies are not within the protection of the Heard Act (Heard Act, 40 U.S.C.A. 270). These premiums are not 'labor and materials' and only persons who have furnished labor or materials are entitled to intervene." (p. 836).

Also, similar situations are presented in those cases which deny recovery against the surety on behalf of persons who have loaned money to the contractor to be used and which is actually used to pay for labor. *Bill Curphy Co. v. Elliott* (1953), 207 F. 2d 103; *United States for Use of Dorfman v. Standard Surety and Casualty Co. of New York* (1941), 37 Fed. Supp. 323.

The petitioners have cited no authority contrary to the principles herein above expressed.

In the case of *United States for the Use of Gibson v. Harman* (1951), 192 F. 2d 999, an action was commenced for recovery of a workmen's compensation award by the employee of an insolvent contractor who had let his workmen's compensation insurance lapse contrary to state law. In holding that the surety was not liable because the claim was not for "labor", the

Court stated, at page 1001, in language directly applicable here:

> "We recognize that the statute is to be given a liberal construction so as to protect fully the furnishing of labor or materials for government work. *Clifford F. MacEvoy Co. v. United States for use and benefit of Calvin Tomkins Co.*, 322 U.S. 102, 64 S.Ct. 890, 88 L.ed. 1163; *Brogan v. National Surety Co.*, 246 U.S. 257, 38 S.Ct. 250, 62 L.ed. 703; *Ross Engineering Co. v. Pace*, 4 Cir., 153 F.2d 35. We do not think, however, that the most liberal construction would justify the holding that a compensation award is within its coverage. Such an award is not within the language of the statute as it is neither labor nor materials; and it clearly does not fall within the legislative purpose which was to provide for those supplying labor and materials for government construction protection equivalent to that furnished in the case of private construction by mechanics and materialmen's liens."

(a) *Even assuming that the employer-contributions were wages, since the contractor has paid the laborers in full, the surety would not be liable for the unpaid contributions because the obligation to pay the contributions into the Health and Welfare Fund is not based on the contract between the United States and the contractor but was an obligation created by an independent agreement between the contractor and union.*

If the plain language of the trust agreement, the bond, and the Miller Act should be disregarded and

the rules set forth in the cases above cited be ignored, the petitioners still cannot recover because they have not established the first condition of recovery, namely: nonpayment of the laborers.

Although this is a case of first instance on the precise facts presented, the same basic issue has been presented in the case of *U. S. Fidelity & Guaranty Co. v. U. S.* (1952), 201 Fed. 2d 118, in which a subcontractor defaulted and among other things was indebted at the time of his default to the United States for withholding taxes withheld from its employees on their wages but not paid to the Government.

The surety company, which had written the subcontractor's payment bond, claimed the right to unpaid balances owing the subcontractor by virtue of assignments to it of all funds due under its contract with the United States as provided for in the application for the bond executed by the subcontractor. The United States claimed a prior right thereto in satisfaction of its lien against the subcontractor because of his failure to pay over the amounts withheld.

The Court held that the surety was not liable to the United States under its bond for the taxes withheld from wages but not paid over.

The Court reasoned that the employer had discharged its contractual obligation to pay in full the wages of those performing labor and therefore the surety was not liable because all payments for labor had been made.

The Court stated at page 121 as follows:

> "The reasons that impel us to conclude that Kendrick's liability for these taxes was not a liability for the payment of wages and that failure to pay them to the Government was not a breach of its contractual obligation to pay all wages and material claims requires the same conclusions with respect to this contention. The debate on the floor of Congress indicates that the performance bond of the Miller Act was to make the contractor liable for default by reason of his inability to complete the contract or by reason of failure to meet the requirements and specifications as to material, and that the payment bond was to insure the contractor's liability for claims of subcontractors, materialmen and laborers. There is nothing in the legislative history of the Miller Act or the acts which it succeeded to indicate that the performance bond was to cover any obligations other than the requirement that the contractor complete his contract according to its specifications."

The Court pointed out at page 120 that from the statutes and regulations set out in the case "it seems clear that when an employer withholds the tax from an employee's wage and pays him the balance, the employee has been paid in full. He has received his full wage. Part of it has gone to pay his withholding tax and the balance he has. The employer has discharged his contractual obligation to pay the full wage. Thereafter there remains only his liability for the tax which he has collected. That is a tax liability for which he alone is liable to the Government as for any other taxes which he may owe."

To the same effect are *United States v. Crosland Construction Company* (1954, 4th Cir.), 217 F. 2d 275; *United States v. Zschach Construction Co.* (10th Cir.), 209 F. 2d 347; *Westover v. William Simpson Construction Co.* (9th Cir.), 209 F. 2d 908; *Fireman's Fund Indemnity Co. v. U. S.* (9th Cir.), 210 F. 2d 472; *General Casualty Co. of America v. U. S.* (5th Cir.), 205 F. 2d 753.

The Court in *U. S. v. Crosland,* supra, 217 F. 2d 275, pointed out that the decision is supported by *Central Bank v. U. S.* (1952), 345 U.S. 639, 73 S.Ct. 917, 97 L.ed. 1312:

> "That the Government's claim against the contractor for amounts withheld could not be set off against amounts due the contractor's assignee because of the provision of the Assignment of Claims Act, 54 Stat. 1029, 31 U.S.C.A. Sec. 203, that 'such payments shall not be subject to reduction or set off for any "indebtedness of the assignor to the United States arising independently of such contract."' The Supreme Court said:
>
> > "The requirement that Graham withhold taxes from the 'payment of wages' to its employees and pay the same over to the United States did not arise from the contract. The requirement is squarely imposed by §§1401 and 1622 of the Internal Revenue Code. Without a government contract Graham would owe the statutory duty to pay over the taxes due, just as it would to pay its income tax on profits earned. Graham's embezzlement lay neither in execution nor in breach of the contract. It arose from the conversion of the withheld taxes

which Graham held as trustee for the United States pursuant to §3661 of the Code. Assignor Graham's indebtedness to the United States arose, we think, 'independently' of the contract. 345 U.S. at pages 645, 646, 73 S.Ct. at page 920.

"We agree with the Fifth Circuit: 'Though measured by the amount of wages, the money due the United States was owing as taxes and not as wages.' *General Casualty Co. of America v. U. S.*, 205 F.2d at page 755. Such a claim is not covered by the bond in this case. The judgment of the District Court must be affirmed."

In the *Central Bank v. U. S.*, supra, the Graham Company had entered into a contract and as permitted by the Assignment of Claims Act of 1940 the contract authorized Graham to assign the proceeds of the contract to a bank and payments to the assignee bank were not to be "subject to reduction or set off for any indebtedness of the contractor to the Government arising independently of this contract." The question in issue before the Court was whether or not withholding taxes and Federal unemployment taxes which the Graham Company had withheld from salaries and wages of employees constituted an indebtedness arising "independently" of the contract. The Court held that the obligation of the Graham Company to the Government was independent of the contract, using the language above quoted.

The reasoning of the cases cited would seem decisive in settling the issue in the instant cases. Unlike the withholding tax cases, here there were *no* deduc-

tions made from the employees' salaries. The employees were paid *in full without deduction*. (R. 14.)

Furthermore, the obligation of the contractor to pay the contributions arises not by virtue of his contract with the United States to which the performance bond of the defendant surety relates but rather to the Trust Agreement established many months after the contract with the United States was entered into. (R. 21.)

And as has been pointed out in detail, the Trust Agreement itself specifically provides that the contributions to the Fund would not constitute or be deemed to be wages due to the employees (Art. II, Sec. 3, Trust Agreement, R. 21) and the employee loses nothing by the nonpayment of the contributions because his benefits are conditioned not on the employer-employee relationship or on the employer's contributions but rather on the number of hours worked in the industry during a given six-month period. The case of *Sherman v. Achterman* (San Francisco Superior Court No. 2368-2370, App. C. to Petition for Certiorari, p. XV), seems of little persuasive force. Since the rendition of the decision in that case, another written opinion was rendered in the Superior Court of the State of California, in and for the County of Los Angeles, in the case of *J. W. Bernard v. Indemnity Insurance Company of North America*, No. 654738. (An appeal is apparently pending.) Being unreported, we attach a copy of said judgment and the memorandum and order as Appendix A. This decision we feel answers completely

the faulty reasoning contained in the case of *Sherman v. Achterman,* wherein the majority of the Court attempted to distinguish the provisions of the Miller Act and those of the applicable state statute. Of course, if there were no distinction, the case was wrongly decided for the reasons given above in this brief. If there were such distinctions, the case, of course, would not be controlling.

3. Not only have all of the obligations of the surety been satisfied according to the condition of the bond, but also the plaintiffs in this action are not persons who furnished labor or material in the prosecution of the work provided for in the contract nor are the amounts sought to be recovered "sums justly due" to persons who furnished the labor.

As the Circuit Court has pointed out, the petitioners are not persons who furnished labor or materials and therefore may not maintain an action for recovery on the bond. (R. 64.)

However, the Court went on to say that even if it were to assume that petitioners were authorized to maintain the action "for and on behalf of persons who furnished labor, recovery could not be had because the delinquent payment sought to be recovered are not 'sums justly due' the persons who furnished the labor."

The Miller Act gives a cause of action against the surety to "*every person who has furnished labor* . . . in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under Section 270a of this title and who has not been paid in full therefor . . ." and permits such person "the right to sue on such payment bond for

the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums *justly due him . . .*" (40 U.S.C.A. 270b, italicizing added.)

The bond itself sets forth the condition that the "principal shall promptly make payment *to all persons supplying labor . . .*"

It cannot be argued that the petitioners, who are trustees of a Health and Welfare Fund, are "persons who furnished labor" in the prosecution of the work specified in the contract between the contractor and the United States—no matter what the nature of the employer-contributions which are provided in the trust agreement.

Therefore, by reason of the plain wording of the Miller Act petitioners are not persons entitled to recover against surety.

Petitioners attempt to avoid the requirement of the Act by arguing that there has been an equitable assignment of the rights and claims of the laborers.

This reasoning, however, overlooks the fact that petitioners are not suing as assignees, or for or on behalf of the laborers, but rather are suing in their own right as trustees of the Fund pursuant to the trust agreement. As a matter of fact, the employees themselves have been paid in full and have no cause of action against either the contractor or the surety and the only persons authorized to sue under the trust agreement are the trustees. (See Art. IV, pp. 7-8, Trust Agreement, R. 21.)

Thus, there is nothing "justly due" to the laborers themselves which has been or can be assigned to the petitioners herein.

The argument of petitioners begs the very question in issue.

There are, therefore, three basic reasons why the surety has no liability to the trustees of the Health and Welfare Fund:

First, the persons who actually furnished labor on the job have been paid in full pursuant to the contract so there is nothing "justly due" them.

Second, the petitioners in any event are not "persons who supplied labor or material in the prosecution of the work."

Third, the amounts claimed by the petitioners are not for work provided for in the contract.

The contentions of the petitioners that they are in the status of assignees of the laborers have no more validity than would a similar claim by the person to whom the Workmen's Compensation premiums were unpaid (*U. S. ex rel Southern G.-F. Co. v. Landis & Young, supra,* 16 Fed. Supp. 832) or the persons who loaned the money with which laborers were paid on a Federal public job (*Bill Curphy Co. v. Elliott, supra,* 207 F. 2d 103).

The requirements of the Miller Act in respect to who is entitled to sue thereunder are clearly set forth in *Clifford-F. MacEvoy Co. v. United States,* for the use and benefit of Calvin Tomkins Co., supra, 88 L.ed. 1163, 64 S.Ct. 890:

"The proviso of Section 2(a), which had no counterpart in the Heard Act, makes clear that the right to bring suit on a payment bond is limited to (1) those materialmen, laborers and subcontractors who deal directly with the prime contractor and (2) those materialmen, laborers and sub-subcontractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor and who give the statutory notice of their claims to the prime contractor. To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso and to the expressed will of the framers of the Act. Moreover, it would lead to the absurd result of requiring notice from persons in direct contractual relationship with a subcontractor but not from more remote claimants."

The argument that public interest requires an interpretation of the Miller Act which would disregard the limitations expressed therein is without merit.

First, the petitioners assert that one of the objectives of the Miller Act is to avoid delays in Government projects and that if the contractor fails to make his contributions, the union may delay the work by calling a strike. However, the cases cited herein are clear that the legislative intent of the Miller Act is to insure payment of the wages of those furnishing labor and materials. The Act is not concerned with the forestalling of strikes. Many actions of a contractor can cause delays—and adequate protection to the

United States is provided in the performance bond should such delay occur.

Second, the argument of petitioners also overlooks the fact that the primary purpose of the Miller Act is to provide for persons supplying labor and materials on Federal construction projects protection equal to that given in private construction by mechanics and materialmen's liens, and also to protect the United States (*United States to the use of Gibson v. Harman, supra,* 192 F. 2d 999). The statutes creating these liens are meant to protect and favor those who actually worked on, or contributed labor or materials to, the construction, improvement or repair of a building or other structure, thereby enhancing its value (*In re Louisville Daily News & Enquirer,* 20 Fed. Supp. 465, 466). Although no cases have been found, it could hardly be supposed that, were these private buildings, they would be lienable under the Mechanic's Lien laws for the unpaid contributions. The beneficiaries have been paid the wages due them for their contribution to the buildings; the sums unpaid are for benefits which are unrelated to the construction of the buildings and add nothing to the value thereof (*U. S. ex rel Southern G.-F. Co. v. Landis & Young, supra,* 16 Fed. Supp. 832).

Finally, there is no reason why public interest requires the Courts to extend the protection of the Miller Act to trustees of a Health and Welfare Fund in the face of the plain language of the Act which covers only the laborer himself.

To the contrary, it has been pointed out in an excellent discussion of the problems existing in the field of Health and Welfare Funds (8 Stanford Law Review 655, July 1956) that present public interest is concerned with the imposition of *controls* on the trustees of such funds to safeguard the rights of the employees, rather than extension of existing rights and powers of the trustees.

The intent of the Miller Act is to protect those furnishing labor by insuring to them payment of their wages in full. The public interest would not be served if the funds available because of such payment bond are depleted by permitting those not within the coverage of the Act to participate therein. The Miller Act provides that the amount of the payment bond be 50% of the total amount payable by the terms of the contract if the amount be $1,000,000 or less; 40% in case the total amount payable be between $1,000,000 and $5,000,000; and if the amount be over $5,000,000, the payment bond must be $2,500,000. If the persons performing labor are to be paid *in full,* despite the limitation in the amount of the bond, the funds available should not be paid out unnecessarily.

It is pointed out again that a person performing labor loses no benefit under the trust agreement because the contractor fails to pay his contribution to the trustees. Eligibility to benefits is not dependent on the payment of the employer contribution. The unpaid contribution is simply a debt owed by the contractor to the fund by reason of a simple debtor-

creditor relationship. Thus, the basic protection of the person performing labor is satisfied when his wages are paid him in full.

B. THE SURETY IS NOT LIABLE FOR ATTORNEYS' FEES NOR FOR LIQUIDATED DAMAGES UNDER THE BOND.

The petitioners state on pages 40 and 41 of their brief that "Liquidated damages and attorneys' fees were a part of the agreed payment for labor . . . and as a part of such agreed payment, they should also be recoverable against the surety under a Miller Act bond." Inasmuch as they make no attempt to distinguish between contributions to the welfare fund, or attorneys' fees or liquidated damages, the petitioners apparently take the position that *any* benefits given by a contractor-employer to his employees as a result of collective bargaining, and any agreed monetary value ascribed thereto by the parties is recoverable against a Miller Act surety in that amount. Such can hardly be the law. As hereinafter pointed out, liquidated damages and attorneys' fees not being provided for by the contract between the contractor and the United States, nor being an integral part of the obligation to pay for labor performed, cannot be covered by the bond.

1. Attorneys' fees are not recoverable under the Miller Act.

Mechanics' liens were unknown at common law or at equity and are purely statutory (*In re Louisville*

Daily News & Enquirer, supra, 20 Fed. Supp. 465, 466.) In the absence of a valid statute that expressly authorizes an allowance or taxation of attorneys' fees as costs, they may not be allowed or taxed as costs. (*United States to the use of Watsabaugh & Co. v. Seaboard Surety Co., supra,* 26 Fed. Supp. 681.)

The Miller Act makes no express provision for the allowance of attorneys' fees in actions upon contractor's bonds. *United States v. Breeden* (1953), 110 Fed. Supp. 713, and *United States v. Henley* (1954), 117 Fed. Supp. 928, which permitted recovery of attorneys' fees where state statutes permit such recovery in actions on mechanics' liens are in conflict with *United States to the use of Watsabaugh & Co. v. Seaboard Surety Co., supra.* In any event, even if these cases were properly decided, they are not applicable because petitioners cite no California statute authorizing such recovery.

2. Liquidated damages are not recoverable.

The respondent, Hartford Accident and Indemnity Co., was not a party to the trust agreement, and as to it, the petitioners' damages, if any, are unliquidated.

It seems well settled in any event that a surety is not liable for damages whether liquidated or not, suffered in connection with a contract (*U. S. for the use of Edward E. Morgan Co., Inc., v. Maryland Casualty Co.,* 1945, 147 F. 2d 423) wherein the subcontractor sued the surety of the general contract under the Miller Act for damages consisting of the reasonable rental value of equipment. The subcontractor claimed

to have suffered such damage when its equipment was forced to remain idle by order of the contracting officer. In denying liability, the Court stated that it was "not warranted in writing liability into the contract and the statute." The Court pointed out that even though the subcontractor might sue the contractor or the Government for breach of contract, the surety has no liability because "nothing was owing for work, labor or equipment and nothing was owing for material in the prosecution of the work."

To the same effect is the case of *U. S. for the use of Gibson v. Harman, supra* (1951), 192 F. 2d 999, wherein the surety was held not to be bound to pay a delinquent Workmen's Compensation award.

V.

CONCLUSION.

There can be no recovery by the petitioners from the surety and the judgment of the Circuit Court affirming the granting of summary judgment in favor of the surety by the District Court should be affirmed because:

1. The obligations of the contractor under the Miller Act were satisfied and the condition of the bond fulfilled in that all persons performing labor were paid in full by the contractor without deduction.

2. The unpaid contributions to the Health and Welfare Fund for which recovery is sought were not wages required to be made by the contractor but were

an obligation on the part of the contractor arising from a trust agreement entered into independently, and after the execution, of the contract between the contractor and the United States to which the bond related.

(A) Even if the unpaid contributions had constituted deductions from wages, recovery could not have been had against the surety because the contractor's obligations to the persons performing labor had been satisfied in full and any duty the contractor had to make payments to the Welfare Fund did not arise under the contract between him and the United States.

3. Regardless of the nature of the employer-contributions, the plaintiffs, as trustees of the Welfare Fund, are not persons who furnished labor or materials for the performance of the contract and, therefore are not persons entitled to protection under the Miller Act or to recover against the surety on the payment bond.

4. Liquidated damages cannot be recovered from the surety under any theory because such damages are not covered or provided for in the payment bond furnished by the respondent herein. Moreover, if any damages are owed by the contractor to the trustees in this case they are owed pursuant to a separate agreement and are not, in any event, the obligation of the surety.

5. Attorneys' fees are not recoverable from the surety in this case under the Miller Act nor are they

recoverable under the trust agreement which was not related to the contract between the contractor and the United States.

Dated, San Francisco, California,
October 19, 1956.

Respectfully submitted,
JOHN W. DINKELSPIEL,
DINKELSPIEL & DINKELSPIEL,
Counsel for Respondents.

RICHARD C. DINKELSPIEL,
Of Counsel.

(Appendix A Follows.)

Appendix A

Filed June 26, 1956,
Harold J. Ostley,
County Clerk
By C. J. Towey, Deputy.

Entered June 27, '56, Book 3118, Page 086.
Harold J. Ostley,
County Clerk
G. C. Ericsson.

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Attorneys for Defendant
Indemnity Insurance Company of
North America

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 654,738

J. W. Bernard, et al.,
Plaintiffs,

vs.

Indemnity Insurance Company
of North America, et al,
Defendants.

Judgment

The demurrer of defendant Indemnity Insurance Company of North America to plaintiffs' first amended

complaint came on regularly for hearing on June 8, 1956, in Department 26 of the above entitled court, before the Honorable Leon T. David, judge presiding, Dillavou, Cox & Mason appearing as attorneys for plaintiffs, and Anderson, McPharlin & Conners appearing as attorneys for demurring defendant; and the matter was at that time taken under submission. A memorandum and order having been made by the above entitled court sustaining the demurrer of defendant Indemnity Insurance Company of North America without leave to amend, on or about June 13, 1956,

It Is Ordered, Adjudged and Decreed that the above entitled action be and the same hereby is dismissed as against Indemnity Insurance Company of North America, defendant, and that defendant Indemnity Insurance Company of North America have judgment against the plaintiffs for its costs of suit incurred herein in the sum of $.....

Dated: June 25, 1956

Leon T. David
Judge of the Superior Court

J. W. Bernard, et al., vs. Indemnity Insurance Company of North America, et al.

No. 654,738

State of California,
County of Los Angeles } ss.

I, Harold J. Ostly, County Clerk and Clerk of the Superior Court within and for the county and state aforesaid, do hereby certify the foregoing to be a correct copy of the original Memorandum and Order, filed June 14th, 1956; and Judgment, filed June 26th, 1956 and thereafter entered June 27th, 1956 in Book 3118 at Page 86 of Judgments, on file and of record in my office, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 9th day of July 1956.

Harold J. Ostley,
County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.
By B. Lurani, Deputy.

Filed June 14, 1956,
Harold J. Ostley,
County Clerk
By C. J. Towey, Deputy.

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 654,738

J. W. Bernard, et al.,
Plaintiffs,

vs.

Indemnity Insurance Company
of North America, et al.,
Defendants.

Memorandum and Order

The allegations of the First Amended Complaint are to be considered true upon general demurrer. The question presented is whether trustees of a health and welfare fund are entitled to sue on a bond to insure the payment for labor and materials for public work to those furnishing the same (Govt. Code, sec. 4200-4205). The law provides (Govt. Code, sec. 4205; Exh. A) that the bond "shall by its terms inure to the benefit of any and all persons entitled to file claims under Section 1184e, now 1192.1 of the Code of Civil Procedure so as to give a right of action to them or their assigns in any suit brought upon the bond". The plaintiffs are trustees of the Carpenters Health and

Welfare Trust for Southern California. It is claimed that the defendant Hudson Construction Company, principal on the bond, engaged to pay such trustees for the fund the sum of five cents per hour per carpenter employee employed under certain public contracts, and ten cents per hour, in a later period on such contracts. These "Health and Welfare Contributions" have not be paid. Recovery for them is sought against the bonding company, and a general demurrer is interposed.

The defendant contractor after the date of the bonds (IV, V) agreed in writing with the Building and Construction Trades Council (V, Exh. B) to comply with a Labor Agreement (V, Exh. C) and this in turn is alleged to have required the Health and Benefit payments to be made (V) under an Agreement and Declaration of Trust (I, Exh. G) administered by plaintiffs. In that exhibit, Article III provides for "contributions to the fund" by the employer, and Article II, section 3 provides "Contributions to the Fund shall not constitute or be deemed to be wages due to the employees with respect to whose work such payments are made, and no employee shall be entitled to receive any part of the contributions made or required to be made to the Fund in lieu of the benefits provided by the Health and Welfare plan".

The Labor Agreement, Exhibit C (p. 31) establishes hourly wage rates, and lists separately the Health and Welfare payments.

As against defendant Hudson Construction Company, the employees were third-party beneficiaries of

the agreements pleaded as Exhibits B, C, and G. As in any contract, the consideration to pass for services included the stipulated hourly wage plus any other detriment promised by the contractor, and this consisted herein of the health and welfare fund contribution. By the nature of the agreements pleaded, the plaintiffs have, in my opinion, capacity to sue the contractor as plaintiffs for the benefit of such fund.

In relation to the obligations of the bonding company, it does not necessarily follow that the obligation of the bond is correlative to the contractual liability of the general contractor. The bonding procedure is established by law, in connection with public contracts. Liability is limited to the purposes and extent provided by the applicable statutes.

Since mechanics and materialmen's liens do not lie against governmental property, (Miles v. Ryan, 172 Cal. 205), the bonding procedure (Govt. Code, sec. 4200-4208) is designed to give mechanics and materialmen equivalent security in the form of the band (Govt. Code, 4205) and the Government Code provision last cited holds the persons entitled to recover and the purposes for which recovery may be had are those specified by C.C.P. sec. 1192.1. So far as applicable here these are "Any materialman or person furnishing materials, provisions, provender, or other supplies", or "any person who performed work and labor upon the same", or "any person who supplies both work and materials" or those who furnish "appliances, teams or power" (C.C.P. 1181, 1200.1). Though not required as to the Governmental agency (Govt.

Code, sec. 4207) no action may be brought on the bond (C.C.P. sec. 1200.1) unless a notice was given to the surety within the claim period (Govt. Code, sec. 4208). There is no allegation that such was done.

The contractors bond "inures" to the benefit of any and all persons entitled to file claims under Section 1192.1 of the Code of Civil Procedure so as to give a right of action to them or their assigns in any suit brought upon the bond" (Govt. Code (1955) sec. 4205). C.C.P. (1955) sec. 1192.1 relates to "any person who performed work or labor" as the parties so entitled to sue. The plaintiffs clearly are not such parties. It is necessary to construe Government Code sections 4200-4208 in pari materia with the mechanics lien laws, and we believe it erroneous to conclude that one need not be within the scope of the mechanics lien provisions in order to proceed on the bond, in view of the express provisions of Government Code, section 4205, 4206 and 4208 incorporating the Code of Civil Procedure sections.

These contributions payable directly by the employer to the "welfare fund" obviously do not create specific funds for the benefit of specific employees, which such employee could collect or withdraw upon terminating his employment or withdrawing from membership in the union. The employees of the employer and their families were entitled under certain contingencies to receive medical and hospifal benefits through the welfare fund. The fund created, however, is not solely for the benefit of the employees of the defendant contractor but for the benefit of the em-

ployees of all employers who are members of the collective bargaining agreement.

A proprietary right in and to the Health and Welfare Fund, in the individual employee concerned, is expressly negatived by the Trust Agreement Exh. G. Article II, section 3, which provides "no employee shall be entitled to receive any part of the contributions made or required to be made to the fund in lieu of the benefits provided by the Health and Welfare plan. The Trust Agreement (Exh. G) is signed by the various unions from which the employed come, and carries no assignment of consideration by them, nor does the pleaded record show any individual assignment of the individual employees compensation—if indeed the Health and Welfare payments were part of it—to the union. The truth seems to be that the payment was, as indicated, a forced contribution from the employer. Under Labor Code section 227 (Stat. 1955c. 1570) it is a misdemeanor for an employer to fail to make such payments when contacted, but this was enacted subsequently to any bond here in question. If the Health and Welfare Fund payments are part of compensation for labor they are wages, and any assignment must specifically be in writing by the employee. (Labor Code sec. 300; 224.) The Trust Agreement Exh. G perhaps in an attempt to avoid the application of these sections, defines the contributions as not to be wages, which are the payment for "work or other services" (Webster's New Int. Dict. 2d ed.). That being so, (a) the bond does not cover such payments; and (b) if that is not so, then the plaintiffs

not having any of the required assignments are not entitled to sue on the bond, as they did not furnish anything to the job.

In a parallel situation, it is to be noted that in order to cover workmen's compensation payments, it was thought necessary to amend the statute to specifically include them (Govt. Code, sec. 4204, amended by Stat. 1947c. 1093, p. 2505).

We believe that neither the Complaint, nor the present First Amended Complaint state a cause of action against the bonding company, nor can such be stated under the agreements in question, and the applicable law.

This conclusion is fortified by the parallel holdings in (a) City of Portland, ex rel. National Hospital Association, 9 P.2d 115. This seems directly in point. (b) U.S. ex rel. Sherman v. Carter (C.C.A. 9th 1956) 229 F. 2d 645 (which has been appealed).

The attempt to distinguish these cases in Sherman v. Achterman, et al. (Superior Court S.F. App. Dept. #2368, 2370) on the basis that "The Oregon statute refers to the *persons* to whom claims shall be paid . . . . but the California statute refers to the *subject matter*"; and a similar comment as to the federal Miller Act, pays too much attention to Government Code sec. 4204 and 4205 and neglects entirely the C.C.P. section 1184c which section 4205 incorporates; and C.C.P. sections 1184, 1184a, 1184b, 1184c and 1184e made applicable by Government Code section 4208, except as those sections are modified by Government Code 4207.

Under the Federal Bankruptcy Act, it is held that welfare fund claims are not "wage claims" entitled to priority under section 64(a)(2) of the Bankruptcy Act (Matter of Brassel, etc. 135 F. Supp. 827).

It seems quite clear the right to sue the surety on a statutory undertaking involves both *person* and *subject matter* involved under the mechanics' lien laws, nothing more nor less.

Since the bonds are pleaded as Exhibits, allegations in the complaint as to their legal effect, i.e., that they include the health and welfare payments, are mere surplusage, and do not expand the cause of action first attempted to be stated in the original Complaint. (Castro v. R. Goold & Son Inc., 128 C.A.2d 40, 47.)

From the foregoing

It Is Hereby ordered:

That the demurrers of the defendant Indemnity Insurance Company of North America are sustained without leave to amend.

June 13, 1956

Leon T. David, Judge